TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 226.

GILA BEND RESERVOIR AND IRRIGATION COMPANY, APPELLANT,

vs.

THE GILA WATER COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED APRIL 13, 1905.

(19,708.)

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1 In the Supreme Court of the Territory of Arizona. (January Term, 1903.)

GILA BEND RESERVOIR AND IRRIGATION COMPANY (a Corporation), Plaintiff and Appellant,

vs.

PEORIA CANAL COMPANY (a Corporation), THE ARIZONA CONSTRUCTION COMPANY (a Corporation), JAMES M'MILLAN, Receiver, J. C. WYND, H. C. MANN, J. B. GREENHUT, C. F. AINSWORTH, W. E. THORNE, C. E. CROWLEY, VALLEY CANAL AND LAND COMPANY (a Corporation), Defendants, and THE GILA WATER COMPANY (a Corporation), Defendant and Appellee.

Appealed from District Court of Maricopa County.

Transcript of Record.

The above named plaintiff, complains of the above named defendants, and for cause of action alleges:

I.

That plaintiff, the Gila Bend Reservoir and Irrigation Company and the defendants, the Peoria Canal Company, Valley Canal
2 and Land Company and the Gila Water Company, are corporations duly incorporated under the laws of Arizona and have heretofore been doing business in the County of Maricopa, Territory of Arizona.

That defendant, the Arizona Construction Company, is a corporation duly incorporated under the laws of the State of Illinois and has heretofore been doing business in said County of Maricopa.

That C. F. Ainsworth is a resident of Phœnix, Maricopa County. That James McMillan, Receiver, J. C. Wynd, H. C. Mann, J. B. Greenhut, W. E. Thorne and C. E. Crowley are non-residents.

II.

That plaintiff is the owner in fee of the following described realty:

Description.

The southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section twenty-eight (28), and the north half of the southwest quarter of section twenty-seven (27), all in township two (2) south, range five (5) west, of the Gila and Salt River Base and Meridian;

Also all those certain appropriations of water from the Gila river at a point on the east and west bank thereof, in township two (2)

south, range four (4) west of the Gila and Salt River Base and Meridian made by G. W. Webb, April 28th, 1881, and the notice thereof recorded in book 2 of Misc. records, page 237, county records of Mari-ropa county;

Also, that certain other location and appropriation of seventy-five thousand miner's inches of water taken from the Gila river at or below the base of Power's Butte, Maricopa county, about one-half mile below the mouth of the Hassayampa river, such appropriation having been made on September 8th, 1887, by Wells H. Bates, De Witt C. Bates, R. C. Powers, and Royal A. Johnson, and recorded in book 1 of canals, page 120, county records of Maricopa county:

Also, that certain other water location of five thousand cubic feet per second constant flow to be taken from the Gila river by impounding same and by means of a dam or dams from the Gila river on the northeast quarter of section twenty-eight (28), township two (2) south, range five (5) west, the same having been appropriated by R. C. Powers on April 24th, 1889, and the notice thereof having been record in book 1 of canals, page 154, county records of Maricopa county;

Also, that certain other location of dam site and canal head, located at a point about twenty-three (23) miles north of Gila Bend
3 Station, in Maricopa county, Arizona, on the Gila river, more particularly described as follows; At a point where Malpai butte on the east side of the river narrows up the valley of the Gila river, being the first butte north of Gila Bend Station; said location having been made by Lewis Wolfley and Royal A. Johnson, October 27th, 1887, and recorded in book 1 of canals, page 123, county records of Maricopa county, Arizona Territory;

Also, that certain other water appropriation of twenty thousand miner's inches appropriated out of the waters of the Gila river by the Peoria Canal Company, June 20th, 1893; said water to be taken from said river at a point on the west side thereof, in said county of Maricopa, Territory of Arizona, about twenty-four (24) miles northerly from Gila Bend Station on the Southern Pacific railroad; said point being where the first butte on the east side of said river north of Gila Bend Station, and a mesa point on the west narrows up the channel of the river; the notice of said appropriation being recorded in volume 1 of canals, page 305, county records of Maricopa county, Arizona Territory;

Also, that certain other water location made by the Peoria Canal Company bearing date June 20th, 1893, appropriating all the unappropriated waters of the Gila river, in the Territory of Arizona, to be taken from the Gila river on the east side thereof, in the county of Maricopa, in said Territory, about twenty-four (24) miles northerly from Gila Bend Station on the Southern Pacific railroad; said point being where the first butte on the east side of said river and the mesa point on the west narrow up the channel of the river; the notice of said appropriation being recorded in volume 1 of canals, page 306 thereof, county records of Maricopa county, Arizona Territory;

Also, all other appropriations of water from said Gila river and water rights whatsoever owned by and used in connection with the canal hereinafter described, and the system of irrigation appurtenant and belonging thereto, in the county of Maricopa, and Territory of Arizona, intending thereby to include in the above, all the right, title and interest vested in, or belonging to, or claimed by the Gila Bend Reservoir and Irrigating Company, the Arizona Construction Company, the Peoria Canal Company, and any and all the parties to this suit.

Also, all canals, laterals and branches now constructed and in course of construction; also, the main line of said canal constructed for a distance of about forty (40) miles; said canal being about twenty-five feet in width on the bottom and sixty-five feet wide on the top and ten (10) feet deep, having a carrying capacity of seven hundred fifty (750) cubic feet of water per second, said canal commencing at a point on the Gila river where the dam herein-
4 before referred to and described is constructed, being at a point on the Gila river at or near the center of the north half of section twenty-eight (28), township two (2) south, range five (5) west, in Maricopa county, Arizona Territory, running thence in a southeasterly direction on sections twenty-eight (28), twenty-seven (27), twenty-six (26), thirty-five (35), and thirty-six (36), in township two (2) south range five (5) west; also in the same direction on sections six (6), seven (7), eight (8), seventeen (17), sixteen (16), twenty-one (21), twenty-eight (28), and thirty-three (33), in township three (3), south, range four (4) west; also, in a southerly direction across sections three (3), ten (10), fifteen (15), twenty-two (22), twenty-seven (27), and thirty-four (34) in township four (4) south, range four (4) west; also in a southwesterly direction across sections three (3), ten (10), fifteen (15), sixteen (16), twenty-one (21), twenty-eight (28), twenty-nine (29), thirty-two (32), and thirty-one (31), township five (5) south, range four (4), west; also across section thirty-six (36), in township five (5) south, range five (5) west; thence in a westerly direction across sections one (1), two (2), three (3), four (4), five (5), eight (8), six (6), seven (7), township six (6) south, range five (5) west; thence in a westerly direction across sections twelve (12), one (1), two (2), three (3), four (4), nine (9), eight (8), seventeen (17), eighteen (18), and nineteen (19) in township six (6) south, range six (6) west, all in Maricopa County, Arizona Territory.

Also, the main dam of said canal now constructed on the north half of section twenty-eight (28), in township two (2) south, range five (5) west, in Maricopa County, Arizona Territory; said dam being about twenty-one hundred (2100) feet long and about one hundred (100) feet wide on the bottom and twenty (20) feet wide on the top and about thirty-two and one-half (32½) feet in height, together with proper headgates, all of which is now constructed, built and together with about seventy (70) miles of laterals more or less;

Also, all the rights of way for the dam and head-gates for said canal and dam situate on section twenty-eight (28), in township two (2) south, range five (5) west aforesaid; and all rights of way along the entire length of the above canal as above described, and for fifty (50) feet on each side thereof, together with the reservoirs constructed and built along the line of said canal in connection and used and operated therewith;

Also, all rights of way for its branches and laterals for the entire length thereof, together with all the ditches, aqueducts, dams, and conduits, and also all water rights amounting to about one hundred twenty thousand (120,000) acres of land, each acre of which is entitled to share pro rata in not exceeding seven hundred fifty (750) cubic feet of flow of water per second to be taken from the Gila river, and which shall first flow in the canal before described, as now built or as said canal may be hereafter constructed by any party owning and operating the same, together with all field books, surveys, maps, instruments and all other property pertaining to and owned by and used in connection with the canal and branches thereof and its system of irrigation in Maricopa county; also all grants, rights, licenses, easements, privileges, franchises, leases, endowments and advantages and all revenues, rents, tolls or income arising or to arise from said real estate, water rights, canal branches, laterals and all extensions thereof, and all property and estate, real and personal of every kind and nature now owned, claimed or possessed in connection with said property, together with all and singular the tenements, hereditaments, rights, easements and appurtenances thereunto belonging or in anywise appertaining, or now held or enjoyed therewith, and the reversions, remainder and remainders, toll, incomes, revenues, rents, issues and profits thereof and also the rights, titles, interests, estates, property possessions, claim and demand, as well in law as in equity.

That plaintiff is credibly informed and believes that the defendants, the Peoria Canal Company, the Arizona Construction Company, James McMillan, Receiver, J. C. Wynd, H. C. Mann, J. B. Greenhut C. F. Ainsworth W. E. Thorne C. E. Crowley, Valley Canal and Land Company, and The Gila Water Company, make claims adverse to plaintiff's said estate and plaintiff alleges that said defendants have no claims either in law or equity to said property, wherefore plaintiff prays:

First.

That said defendants each and all of them may be required to appear in court and show what, if any, claim they have to said property.

Second.

That plaintiff be adjudged to be the owner in fee of said property.

Third.

That defendants be each and all of them barred and forever estopped from having or claiming any right or title to the premises adverse to the complainant.

Fourth.

And for such other and further relief as may seem to the Court to be just and equitable and for the costs of suit and attorneys' fees.

J. B. WOODWARD,
J. H. KIBBEY,
Attorneys for Plaintiff.

6 *Affidavit.*

COUNTY OF MARICOPA, *Territory of Arizona, ss:*

Lewis Wolfley, President of the Gila Bend Reservoir and Irrigation Company, plaintiff in the above suit, on oath states, that he has read the complaint and knows the contents thereof, and that the same is true of his own knowledge, except the matters therein stated on information and belief, and as to those matters, they are true in substance and in fact.

LEWIS WOLFLEY.

Subscribed and sworn to before me this 25th day of June, 1902.

J. B. WOODWARD,
[SEAL.] *Notary Public, Maricopa County.*

My commission expires Dec. 5, 1902.

Endorsed. Filed June 25, 1902. Elias F. Dunlevy, Clerk.

Answer.

(Title omitted.)

Now comes the above named defendant, Peoria Canal Company, The Arizona Construction Company, James McMillan, Receiver, J. C. Wynd, H. C. Mann, J. B. Greenhut, C. F. Ainsworth, W. E. Thorne, C. E. Crowley and Valley Canal and Land Company, and for himself and itself disclaims all right, title or interest adverse to the complainant herein or any other person, in the property mentioned and described in said plaintiff's complaint.

These defendants further answering,

Allege that they do not claim any right, title or interest whatever

in or to the property mentioned and described in the plaintiff's comp-aint herein, or to any part thereof.

Wherefore these defendants and each of them pray the judgment of this court that the said complaint of the plaintiff herein be dismissed as against each and every of them and that they have and recover of the said plaintiff their and each of their respective costs and disbursements incurred herein.

C. F. AINSWORTH,
Attorney for above named Defendants.

Affidavit.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

C. F. Ainsworth being first duly sworn on oath deposes and
7 says that he is one of the defendants in the above entitled action; that he has read the above and foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

C. F. AINSWORTH.

Subscribed and sworn to before me this 10th day of July, A. D., 1902.

[SEAL.] THOS. D. BENNETT,
Notary Public, Maricopa County.

My commission expires Oct. 19, 1903.

Endorsed. Filed July 14, 1902.

(Title omitted.)
Answer of defendant, The Gila Water Company.
Filed July 14, 1902.

Amended Answer of Gila Water Company.

(Title omitted.)

Comes now the above named defendant, the Gila Water Company, a corporation, and for its amended answer to the complaint herein,

Admits that the plaintiff and this defendant are corporations as alleged in said complaint.

Admits the residence of the other defendants as alleged in said complaint.

Admits that it claims the right, title and interest of the property mentioned and described in the said complaint herein.

Denies that the plaintiff is the owner in fee simple of the property described in the complaint herein.

This defendant further answering the complaint here,

Alleges that it and its grantors have been in peaceable and adverse possession of all the property mentioned in the plaintiff's complaint herein, under title and color of title for more than three years preceding the date of the commencement of this action.

This defendant further answering the complaint herein,

Alleges that this defendant and its grantors have been in peaceable and adverse possession of all the property mentioned and described in the complaint herein, for more than five years prior to the commencement of this action, using and enjoying the same, paying taxes thereon, claiming under deeds duly recorded.

This defendant further answering the complaint herein and by way of cross-complaint,

Alleges that the plaintiff, the Gila Bend Reservoir and
8 Irrigation Company, and this defendant, The Gila Water Company, are corporations duly incorporated under the laws of the Territory of Arizona, and heretofore doing business in the County of Maricopa and Territory of Arizona.

That this defendant, the Gila Water Company, is the owner in fee simple of all the property mentioned and described in the plaintiff's complaint herein, and that this defendant is now and it and its predecessors and grantors have been for over three years last passed in possession of all the property mentioned and described in said plaintiff's complaint herein.

That the said plaintiff, the Gila Bend Reservoir and Irrigation Company, makes claim adverse to this defendant's estate, and this defendant alleges that said plaintiff the said Gila Bend Reservoir and Irrigation Company, has not now and at the time of the commencement of this action had no right, title or interest in and to said property, or any part thereof, either in law or equity.

Wherefore this defendant prays the judgment of this court, that it be adjudged and decreed to be the owner in fee simple of all of the property mentioned and described in the complaint herein, and that said plaintiff be adjudged to have no right, title or interest in and to said property or any part thereof, and that the plaintiff be perpetually enjoined and forever barred and estopped from hereafter claiming any right, title or interest in or to the property mentioned and described in the complaint herein or any part thereof, and that this defendant have and recover of the plaintiff, its costs and disbursements incurred herein, and for such other and further relief as may be just and meet in the premises.

C. F. AINSWORTH,
Attorney for Defendant, Gila Water Company.

Affidavit.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

C. F. Ainsworth, being first duly sworn deposes and says that he is the President of the Gila Water Company, the defendant corpo-

ration mentioned and described in the above entitled action; that he has read the foregoing amended answer of the Gila Water Company, and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

C. F. AINSWORTH,

Sworn to before me this 13th day of September, 1902.

LLOYD B. CHRISTY,

[SEAL.] *Notary Public, Maricopa County.*

My commission expires May 31, 1903.
Endorsed. Filed September 15, 1902.

9 *Answer to Cross-complaint.*

(Title Omitted.)

I.

Comes now the above named plaintiff, the Gila Bend Reservoir and Irrigation Company, a corporation, and for its answer to defendant, the Gila Water Company's cross-complaint herein admits that plaintiff and this defendant are corporations as alleged in said cross-complaint and were incorporated and doing business as therein alleged.

II.

Denies that defendant, the Gila Water Company, is the owner in fee simple, or otherwise, of all or any part of the property mentioned and described in the cross-complaint and in the complaint herein, and denies that said defendant, or its predecessors and grantors, are now or have been for over three years last passed or at any time in the peaceable and adverse or other possession of all or any part of the property mentioned and described in said cross-complaint.

III.

And denies that said plaintiff, the said Gila Bend Reservoir and Irrigation Company, has not now, or at the time of the commencement of this action had no right, title or interest in or to said property or any part thereof either in law or equity or otherwise.

IV.

And plaintiff for further answer to the cross-complaint says that it is informed and believes and therefore alleges that the title, right

and claim upon which said defendant claims its right and title to said property is under and by virtue of a certain judgment and decree of this Court rendered and entered November 20th, 1894, and certain pretended receiver's deed or deeds made, executed and delivered under and by authority of said judgment and decree and proceedings thereunder, or a certain deed or deeds of some person or persons deraigning title under through and by virtue of said receiver's deed or deeds. And this plaintiff further alleges that said judgment and all proceedings thereunder and the making and delivery of said deed or deeds were and are absolutely void and the Court rendering said judgment had no jurisdiction to render said judgment or over any of the property mentioned in the complaint, in this:

1st. That the action in which said judgment and decree was rendered was in a proceeding in rem, and that in said action the said Court never attached, seized, levied upon or took possession of said property, or any part thereof, and never had or acquired any jurisdiction over said property or any part thereof.

2d. That in said action on the 21st day of July, 1894, this Court rendered and entered its judgment and same was and is the only judgment or decree in said action and that thereafter this plaintiff duly appealed from said judgment to the Supreme Court of the Territory of Arizona, and on the 12th day of November, 1894, duly perfected said appeal and that by reason of said appeal this Court then and there lost all jurisdiction in and over said action and thereafter and while said appeal was in full force and effect and said action still pending in said Supreme Court this Court on the 20th day of November, 1894, pretending to have jurisdiction of said action made and entered a pretended amendment to said judgment and decree and which was pretended to be in lieu of said original decree of July 21st, 1894, and which said pretended amendment of said judgment and decree was so rendered and entered by this Court without any jurisdiction of or over said action or said judgment and decree and was and is wholly void and that the only right or title that this defendant has or claims to said property or any part thereof is under and by virtue of said pretended amended and void judgment and decree.

And for another and further and separate answer to defendant's cross-bill herein this plaintiff alleges: That in December, 1893, a receiver was duly appointed by this Court in another action then pending in this Court and that said receiver then and there duly took possession of all of said property mentioned in the complaint herein and during all the times that this defendant claims to have obtained title to any of said property, the same and the whole thereof was in the custody of this Court and in the possession of said receiver and thereafter and prior to the commencement of this action this Court and said receiver ceased to have any custody or possession of said property or any part thereof and that any and all muniments

of title which this defendant may have received to said property or any part thereof by tax deeds or otherwise were and are wholly void.

J. B. WOODWARD,
Attorney for Plaintiff.

Affidavit.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

Lewis Wolfley, President of the Gila Bend Reservoir and Irrigation Company, plaintiff in the above suit, being first duly sworn, deposes and says that he is the president of the Gila Bend Reservoir and Irrigation Company, the plaintiff corporation mentioned and described in the above entitled action; that he has read the
11 foregoing answer to the cross-bill of the Gila Water Company and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to these matters he believes it to be true.

LEWIS WOLFLEY.

Sworn to before me this 15th day of October, 1902.

J. B. WOODWARD,
[SEAL.] *Notary Public, Maricopa County.*

My commission expires Dec. 5th, 1902.

Endorsed. Filed October 17, 1902.

Minute Entries.

And afterwards and upon to-wit the 13th day of October A. D., 1902, the same being one of the regular juridical days of the October Term A. D., 1902, of said Court, the following order, *inter alia,* was had and entered of record in said Court, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

At this day it is ordered by the Court that this cause be set for trial October 23rd inst.

And afterwards and upon to-wit the 24th day of October A. D. 1902, the same being one of the regular juridical days of the October Term, A. D., 1902, of said Court, the following order, *inter alia,* was had and entered of record in said Court, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

At this day before the trial of this cause, plaintiff asks and has leave to amend his answer to the cross-complaint of the Gila Water Co., by changing the date on page 3, from "1894" to "1893."

And afterwards and upon the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

At this day comes the plaintiff hereto by J. B. Woodward, Esq., its attorney, and the defendant, Gila Water Co., by C. F. Ainsworth, Esq., its attorney, also comes.

The disclaimer of all other defendants having been heretofore duly filed herein, and

This cause now coming on to be tried before the Court without a jury, comes the evidence on the part of the plaintiff, at the
12 conclusion of which the defendant moves that this case be dismissed for lack of evidence, which is argued by counsel and the Court being now fully advised in the premises, doth grant said motion and dismiss plaintiff's complaint.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

At this day comes the parties hereto by their attorneys, respectively.

And thereupon this cause coming on to be tried before the Court, upon the issues raised by the cross-complaint of the Gila Water Co. and the answer of the plaintiff thereto, comes the evidence upon the part of the cross-complainant to the hour of adjournment when the further trial is continued until tomorrow at 1.30 o'clock p. m.

And afterwards and upon to-wit the 25th day of October A. D. 1902, the same being one of the regular juridical days of the October Term A. D. 1902,of said Court, the following order, *inter alia,* was had and entered of record in said Court, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

At this day come again the parties hereto in person and by attorney, and thereupon this cause coming on for further trial upon the issues raised by the cross-comp-aint of the defendant and the answer of the plaintiff thereto, comes the further evidence at the conclusion of which and the argument of counsel, by consent is submitted to the Court for its further consideration.

And afterwards and upon to-wit the 8th day of November A. D. 1902, the same being one of the regular juridical days of the October Term A. D. 1902, of said Court, the following order, *inter alia*, was had and entered of record in said Court, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

At this day comes the said plaintiff and asks and has leave to withdraw his motion for judgment heretofore made.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

13 (Title of Cause.)

At this day this cause having been heretofore submitted to the Court for its further consideration, upon the *the* issues raised by the counter-claim of the defendant The Gila Water Co., and the answer of the plaintiff thereto and the evidence taken, and the Court being now fully advised in the premise doth find for the said defendant, The Gila Water Co., on its counter-claim and that it is entitled to the relief prayed for therein.

Whereupon it is ordered that judgment be entered herein in accordance with such finding and that the same be recorded in the Judgment Book.

And afterwards and upon to-wit the 14th day of November A. D. 1902, the same being one of the regular juridical days of the October Term A. D. 1902, of said Court, the following order, *inter alia*, was had and entered of record in said Court, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

At this day comes the said plaintiff by J. B. Woodward, Esq., its attorney, and the defendant, the Gila Water Co., by C. F. Ainsworth, its attorney, also comes,

And thereupon comes the further trial of this cause, plaintiff offers certain documentary evidence which is by the Court rejected and p-aintiff rests and by consent this cause is finally submitted to the Court for its further consideration.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

At this day it appearing that plaintiff's motion for a new trial in this behalf was prematurely filed, plaintiff asks and obtains leave to

withdraw the same from the files and to file a new motion at the proper time.

And afterwards, and upon to-wit the 15th day of November A. D. 1902, the same being one of the regular juridical days of the October Term A. D. 1902, of said Court, the following order, *inter alia*, was had and entered of record in said Court, which said order is in words and figures as follows, to-wit:

(Title of Cause.)

At this day comes the parties hereto by their attorneys respectively, and thereupon this cause having been heretofore tried before the Court and by consent submitted to the Court for its further consideration on the cross-complaint of the Gila Water Co., and the
14 plaintiff's answer thereto, and the Court being now fully advised in the premises, doth find the issues herein joined for the Gila Water Co., on its cross-complaint, and

It is ordered that judgment be entered in accordance with said finding and that the same be recorded in the Judgment Book.

(Title omitted.)

Judgment.

This cause having been regularly tried by the Court without a jury, and the plaintiff being represented by its attorney, J. B. Woodward, and the defendants being represented by their attorney, C. F. Ainsworth, and the Court having heard all the testimony and proofs presented in said cause by the respective parties in said action, and the Court having made its findings of fact and conclusions of law herein, and the decision therein having been duly rendered by the Court, which findings, conclusions and decision are now on file in this case, wherein judgment was rendered in favor of the defendants herein against the plaintiff for their costs and disbursements and that plaintiff's said action be dismissed, and that the defendant, The Gila Water Company, have judgment in accordance with the prayer of its cross-complaint.

Now, therefore, it is by the Court hereby ordered, adjudged and decreed, that the plaintiff's said action be and the same is hereby dismissed.

It is further ordered, adjudged and decreed that the defendant, The Gila Water Company, is the owner in simple fee and in possession of all of the property mentioned and described in the complaint of the plaintiff herein and hereinafter set forth.

It is further ordered, adjudged and decreed that all adverse claims of the plaintiff, the Gila Bend Reservoir and Irrigation Company, and all of the other defendants in this action, and each of them, and of persons claiming or to claim said premises or any part thereof, through or under said plaintiff or either of said defendants above

named (except the defendant, The Gila Water Company) are hereby adjudged to be invalid and groundless, and that the title to all of said property be and the same is hereby adjudged and decreed to be quieted against all claims, demands and pretensions of the plaintiff, the Gila Bend Reservoir and Irrigation Company, and of the defendants above named (except the defendant, The Gila Water Company) or either or any of them or any persons claiming through them or either of them.

And it is further ordered, adjudged and decreed that the
15 said plaintiff, The Gila Bend Reservoir and Irrigation Company and the defendants above named (excepting the Gila Water Company) or either or any of them, and all persons claiming through them or either or any of them are hereby perpetually estopped and enjoined and forever barred from setting up any claim, right, title or interest in and to said property or any part thereof, adverse to the title of the Gila Water Company.

That the premises mentioned and described in said complaint and hereinbefore referred to, are described as follows, to-wit:

(See Complaint.)

And it is further ordered, adjudged and decreed that the defendants herein do have and recover from the plaintiff, the Gila Bend Reservoir and Irrigation Company, their costs and disbursements in curred herein, taxed and allowed at the sum of $16.85, and that they have execution therefor.

Dated at Phœnix, Arizona, November 15, 1902.

EDWARD KENT, *Judge.*

Filed in clerk's office Nov. 15th, 1902.

(Title omitted.)

Motion for New Trial.

Comes now the plaintiff and moves the Court for a new trial of this cause for the reasons:

I.

That the Court erred in dismissing plaintiff's suit, after plaintiff had established an equitable interest, through a certain agreement of June 16, 1893, and that the property was in the hands of a receiver of this Court, and that all parties to said agreement and said receiver had answered herein, disclaiming any right, title or interest in or to said property.

II.

The evidence does not sustain the judgment rendered on the cross-complaint.

III.

The Court erred at the trial under the cross-complaint in admitting evidence offered by the defendants.

IV.

The Court erred at the trial under the cross-complaint in excluding evidence by the plaintiff.

16 V.

That the judgment is contrary to law.

J. B. WOODWARD,
Attorney for Plaintiff.

(Title omitted.)

Bill of Exceptions.

(Sections 1459, 1460 and 1465, R. S. of A., 1901.)

Part I.—"Exceptions." Pages 1 to 6 inclusive.
Part II.—"Circumstances and Evidence." Pages 7 to 29.

Part I.—Exceptions.

Be it remembered, that the above entitled cause coming on to be heard before Hon. Edward Kent, Judge of said Court—

1. Plaintiff excepted to the order of the Court dismissing its complaint, for the reason that the plaintiff claimed it had introduced evidence tending to prove an equitable title in and to the property in controversy, and that all the parties, connected with said title, had answered therein, disclaiming any and all right, title or interest in or to said property, except the Gila Water Company, which claimed the legal title, as is fully explained in Part II, paragraphs 1, 2, 3 and 4.

2. Plaintiff excepted to the ruling of the Court allowing defendant, The Gila Water Company, to introduce in support of its cross-complaint, the summons, complaint, exhibits and answers, in suit No. 1996 of this Court, filed May 23, 1894, because it claimed said complaint on its face showed that it asked the seizure of certain therein described property, and therein shown to be, at that time, in the hands of a receiver in a prior suit, and also showed that said receiver was not made a party to said suit No. 1996, and said complaint, summons and answers tended to show on their face fraudulent collusion between plaintiff and defendants, as is fully explained in Part II, paragraphs 5 and 15.

3. Plaintiff excepting to the ruling of the Court allowing The

Gila Water Company to introduce in support of its cross-complaint, the application for and the appointment of James McMillan, on December 6th, 1893, as receiver in suit No. 1728 in this Court, because it claimed said appointment on its face showed it to be only a limited receivership, and because he was never appointed receiver in suit No. 1996, and as being immaterial and irrelevant in this suit, as is fully explained in Part II, paragraphs 4, 5, 8, 10, 12 and 17.

17 4. Plaintiff excepted to the ruling of the Court allowing defendant, The Gila Water Company, to introduce the judgment in said suit No. 1996 of this Court, of July 21st, 1894, and the judgment of November 20th, 1894, being "in lieu" of that of July 21st, 1894, because it claimed said judgments show on their face, that they order the sale of the property, shown by the complaint therein, to be in the hands of James McMillan, a "limited" receiver under suit No. 1728, and who was never made a party to said suit No. 1996, nor were said suits Nos. 1728 and 1996 shown to have been consolidated, as is fully explained in Part II, paragraph 4, 5, 8, 12 and 17, and because it claimed the complaint shows on its face, that it prays for the sale of the therein described property, and that no judgment *in personam* was asked against the defendants, or any of them, as is fully explained in Part II, paragraph 5.

And because it claimed the judgments in said suit No. 1996 were for the sale of the property described in said complaint, and no judgment *in personam* was given against the defendants, or any of them, as is fully explained in Part II, paragraphs 6 and 7.

5. Plaintiff further excepts — the ruling of the Court in refusing to allow the plaintiff to show that no order was made to any officer directing the seizure, or for taking said property into the possession of, or under the control, of the Court, prior to the hearing in said suit No. 1996, and as fully appears in Part II, paragraphs 13 and 17.

6. In refusing to allow plaintiff to show that there is no report of any officer, showing or tending to show, that said property was ever taken into possession, or under the control, of the Court, prior to the hearing in said suit No. 1996, as fully appears in Part II, paragraphs 13 and 17; and

7. In refusing to allow plaintiff to introduce evidence to show that it could not be held to have consented to the receiver in said suit No. 1728, being considered as receiver in said suit No. 1996, or to any other acts done in said suit, as is fully explained in Part II, paragraphs 13, 14, 22 and 23.

8. Plaintiffs excepted to the ruling of the Court allowing defendant, The Gila Water Company, to introduce the judgment of November 20th, 1894, of suit No. 1996, and in refusing to allow plaintiff to show that an appeal had been fully perfected from the final judgment in said suit, of July 21st, 1894, and prior to the rendering of said judgment of November 20th, 1894, as is fully explained in Part II, paragraph 18.

9. Plaintiff excepted to the ruling of the Court allowing defend-

ant, The Gila Water Company, to introduce the report of a
18 sale made by James McMillan to C. E. Crowley of January 5th, 1895, and the order confirming said sale of January 10th, 1895, and purporting to have been made in and under a consolidation of said suits No-. 1728 and 1996, of this Court, for the reason that it claimed that no such consolidation was shown, and because the evidence before the Court showed that said suit had been separately tried, and separately appealed, and that judgments had been rendered in said suit No. 1996, appeals perfected, and that the term of the Court ended, at which said judgments were made, as is fully explained in Part II, paragraphs 8, 9, 10, 11, 12, 17 and 19.

10. Plaintiff excepted to the ruling of the Court allowing defendant, the Gila Water Company, to introduce the deeds to C. E. Crowley, of January 10th, 1895, and to J. B. Greenhut, of November 26th, 1898, purporting on their face to be from James McMillan, a receiver duly appointed in two equity suits Nos. 1728 and 1996 of this Court, and under orders and decrees issued in said suit No. 1996, for the reason that it claimed that the evidence shows that said James McMillan was appointed, as a limited receiver, in said suit No. 1728 and because there is no evidence showing or tending to show, that said James McMillan was ever appointed receiver in, or that he was ever made a party to said suit No. 1996, as is fully explained in Part II, paragraphs 4, 8, 10, 12 and 17.

11. Plaintiff excepted to the ruling of the Court in refusing to allow plaintiff to show that it filed a supplemental complaint in said suit No. 1728, after first serving the same on the attorneys of record of defendants therein, and in refusing to allow plaintiff to show that it attempted, under said supplemental complaint to have James McMillan, receiver in said suit, restrained from advertising or selling plaintiff's property unless so ordered in said suit No. 1728, and in refusing to allow plaintiff to show that it attempted in said suit No. 1728 to have said James McMillan restrained from deeding or giving possession of plaintiff's property to said J. B. Greenhut, or any other person, unless so ordered in said suit No. 1728 as is fully shown in Part II, paragraphs 21, 22 and 23.

12. Plaintiff excepted to the ruling of the Court in refusing to allow plaintiff to show in support of title that it applied to the Supreme Court of the Territory, for a rehearing of the "Findings of Facts" by said Court in said suit No. 1728, and that said rehearing was denied in April, 1902, as is fully shown in Part II, paragraph 24.

13. Plaintiff excepted to the ruling of the Court in refusing to allow plaintiff to show that James McMillan, receiver in said suit No. 1728, was never ordered or authorized in said suit No. 1728 to sell or otherwise dispose of plaintiff property in his hands as such receiver, as is fully shown in Part II, paragraphs 13 and 25.

19 14. Plaintiff excepted to the ruling of the Court in refusing to allow plaintiff to introduce in evidence its motion of "bias and prejudice" and that it offered no defense in said suit No. 1996, as is fully explained in Part II, paragraphs 13 and 14.

15. Plaintiff excepted to the ruling of the Court in refusing to allow plaintiffs to introduce appellant's briefs in said suit No. 1996, being suit No. 455 in the Supreme Court, for the purpose of showing what questions of jurisdiction had been presented in that Court, as is fully explained in Part II, paragraphs 13 and 16.

16. Plaintiff excepted to the ruling of the Court in refusing to allow plaintiff to introduce the records of suit No. 1996 to show that the Court had acquired no jurisdiction over the *res* prior to the hearing and determining said suit, as is fully explained in Part II, paragraphs 13 and 17.

17. Plaintiff excepted to the ruling of the Court in refusing to allow plaintiff to show that the plaintiffs in suit No. 1996 of this Court were all stockholders in the Arizona Construction Company and Peoria Canal Company, and that the stockholders of said companies were one and the same, as is fuly explained in Part II, paragraphs 15 and 16.

18. Plaintiff excepted to the ruling of the Court in giving judgment to defendant, The Gila Water Company, and in not giving judgment to plaintiff as prayed for in its complaint herein for the reasons set forth in the above exceptions and as is fully shown by the Evidence and Circumstances in Part II, paragraphs 1 to 26, inclusive.

19. Plaintiffs excepted to the ruling of the Court denying its motion for a new trial, for the reasons set forth in the above exceptions and as is fully explained by the Circumstances and Evidence contained in Part II, paragraphs 1 to 26, inclusive.

Part II.—Circumstances and Evidence.

(Section- 1459 and 1460, R. S. of A. 1901.)

Paragraph 1. Plaintiff introduced by the records of the recorder's office of Maricopa county, Arizona, the United States receiver's certificate to Lewis Wolfley, of the S. E. ¼ of the N. E. ¼ and the S. E. ¼ of Sec. 28 and N. ½ of the S. E. ¼ of Sec. 27, T. 2 S., R. 5 W., G. and S. R. Base and Meridian; also sheriff's deed to Lewis Wolfley of the water location made by G. W. Webb, April 28, 1881; also the water locations made by Wells H. Bates, DeWitt C. Bates, R. C. Powers and Royal A. Johnson, on September 8, 1887; also the water locations made by R. C. Powers, April 29, 1889, as described in the complaint; also the certificate of location of the dam-site and canal head made by Lewis Wolfley and Royal A. Johnson, October
20 27, 1887, as described in the complaint; also the sheriff's deed to Lewis Wolfley of the dam-site and canal head located October 27, 1887, by Lewis Wolfley and Royal A. Johnson; also the deed to Lewis Wolfley to plaintiff herein of all the above named property, as above described, and a deed from the plaintiff to the Peoria Canal Company dated June 16th, 1893, for the above described property.

Paragraph 2. Plaintiff introduced an agreement of June 16, 1893, between plaintiff, The Arizona Construction Company and Peoria Canal Company, which states that it is a settlement of all differences and controversies, and an adjustment of all contracts existing between the Arizona Consruction Company and plaintiff, and

Therein it states that plaintiff's injunction then pending shall be dissolved and that the sales thereby enjoined shall proceed, and

That the title to plaintiff's property shall be made perfect in the Peoria Canal Company by said company bidding the property in at said sale, and

That the Arizona Construction Company shall pay off and discharge all sub-contractors' liens, and

That the Peoria Canal Company shall make and deliver to the Arizona Construction Company its promissory notes, payable on or before two years from the date thereof, with interest, for all moneys that the Arizona Construction Company had invested, or was liable for, with interest; the amount to be determined by a verified statement of the treasurer of the Arizona Construction Company and as security to said notes, all the capital stock of the Peoria Canal Company was to be placed in escrow; said Peoria Canal Company was to issue $750,000, first mortgage, and $350,000, second mortgage bonds, interest payable semi-annually and redeemable at any interest paying period, said bonds to be placed on the market and all the parties to aid in the sale thereof.

The proceeds of said bonds to go to paying off said two year notes, and if said notes are paid off within two years and sixty days from the proceeds of said bonds, or by plaintiff, that when so paid off the said capital stock shall be delivered to plaintiff.

The maintenance and repairs to be paid from the proceeds of the bonds, or from the sale of water-rights.

One of the signers being John H. Francis, as director of the Arizona Construction Company, and President of the Peoria Canal Company.

Paragraph 3. Plaintiff introduced a *lis pendens* filed September 23, 1893, which states that suit is pending in this Court, Plaintiff *vs.* Peoria Canal Company and Arizona Construction Company, the object of which is to have plaintiff declared the equitable owner of the property herein, and

21 That the Peoria Canal Company be restrained from issuing any notes to any date, prior to having received a full verified statement and securing said notes, as provided for in the agreement of June 16th, 1893, and

That the Arizona Construction Company be required to forthwith make and deliver the verified statement in full, and

That the Peoria Canal Company be required upon the receipt of said verified statement, to issue its notes to the Arizona Construction Company and deposit its capital stock in escrow, as required by said agreement, and

That the Peoria Canal Company be restrained from doing any act

or thing, except as provided for in said agreement, and as set forth in the complaint in said suit, and for such other and further relief as may be just and equitable, and describes the above described property as the object of said suit.

Paragraph 4. Plaintiff introduced the written application of the Peoria Canal Company for the appointment of a receiver, filed December 4, 1893, in the suit of Plaintiff *vs.* Peoria Canal Company, *et al.*, being suit No. 1728 in this Court, also the order made in said suit and dated December 6, 1893, appointing James McMillan receiver,

Said application states that said Peoria Canal Company is in possession and control of the property described in the complaint, under the terms and by virtue of the contract and agreement of June 16, 1893, designated as the tri-partite agreement, and that by reason of damage by a flood, litigation, plaintiff's insolvency and its inability to raise money, states that a receiver is necessary to repair, operate and control the property.

Said order appointing James McMillan receiver, states that he is appointed receiver of the property described, with the power to bring and defend suits, to receive and collect rents, and especially to repair, rebuild and to save the property from all loss by reason of liens and judgments, by the Court, A. C. Baker, Judge.

Paragraph 5. Defendant in support of its cross-complaint introduced all the evidence offered by plaintiff in derainment of its title.

Defendant introduced the complaint and answer in the suit of Plaintiff *vs.* Peoria Canal Company and Arizona Construction Company, filed September 23, 1893, being suit No. 1728 in this Court, which states that plaintiff is the equitable owner of the property therein described, and that the verified statement required by the agreement of June 16, 1893, had not been made and that the two year notes had not issued, nor the capital stock of the Peoria Canal Company placed in escrow, as required by said agreement and that plaintiff prayed to be declared the equitable owner of the property therein, and that the Peoria Canal Company be restrained
22 from doing any act or thing, other than as provided for in said agreement and for such other and further relief as may be just and reasonable.

Said answer, signed November 24, 1893, alleges that the Peoria Canal Company is the legal, equitable and owner in fee of said property and that the verified statement of $721,679.03 was made in full October 5, 1893, and that its capital stock had not been placed in escrow, as contemplated in the agreement of June 16, 1893, and that as soon as debts of the Arizona Construction Company to the subcontractors and others are paid, it will issue the notes due under said agreement and that said notes will bear date June 19, 1893, and that the dam had washed out, and that steps were taken to place a loan of $850,000, and prays the Court to be allowed to issue certificates, on which to borrow money for the purpose of repairing the dam, and

that the Court will quiet title in the Peoria Canal Company and restrain plaintiff from proceeding to prevent the sale of bonds.

Defendant introduced the application for, and the appointment of James McMillan, receiver in said suit No. 1728.

Defendant introduced the complaint and exhibits, summons and answers in suit No. 1996 in this Court, being W. H. Linn, Chas. B. King (executor of the will of Chas. P. King, deceased), Wm. M. Benton, J. W. Gift, Wm. McLean, Jacob Wachenheimer, Jacob Schawabacher, Henry Schwabacher and Thomas McIlvaine, *vs.* The Gila Bend Reservoir and Irrigation Company (a corporation), The Arizona Construction Company (a corporation), The Peoria Canal Company (a corporation), Jas. B. Greenhut, John H. Francis, C. E. Crowley, Redmond Toohey, John C. Ward, and J. M. Burnett.

Said complaint states that said plaintiffs sue for themselves and all other creditors of the Arizona Construction Company and Peoria Canal Company; that said plaintiffs and defendants, Joseph B. Greenhut, John H. Francis and John C. Wynd, are residents of the State of Illinois and that C. E. Crowley is a resident of Los Angeles, California, and

That the Arizona Construction Company is justly indebted to these plaintiffs for money advanced at the request of, and for the use of said company, which sums of money were used by said company in and about the work of constructing a certain dam and canal for said Gila Bend Reservoir and Irrigation Company, all of which sums are due and unpaid; and allege that the agreement of June 16, 1893, was made without their consent and was in fraud of their rights, and that all the parties of said contract were insolvent, and

That this court had on or about December 6, 1893, ap-
23 pointed a receiver and that on or about December 7, 1893, said receiver took possession of the property hereinbefore described and who still holds possession of the same.

Wherefore said plaintiffs pray that the Court appoint a receiver or enlarge the powers of the present receiver and take possession of said property and sell the same to pay the debts proven to the Court. John Stevens and Millay and Bennett, attorneys for plaintiffs. Suit filed May 23d, 1894, and summons issued of that date.

The return of said summons states that it was served on the Gila Bend Reservoir and Irrigation Company and that none of the other defendants were found within the county, dated May 25, 1894.

The answer of the Arizona Construction Company is dated May 24, 1894, and states that the agreement of June 16, 1893, had been made in fraud of the rights of said plaintiffs and that said agreement was impracticable and had not been carried out, and prays the Court to appoint a receiver, or to enlarge the powers of the present receiver and take possession of and sell said property.

The answer of the Peoria Canal Company, dated May 26, 1894, admits that the agreement of June 16, 1893, was in fraud of the rights of said plaintiffs and was impracticable and had not been carried out and asks to be relieved of said trust, and asks that the prop-

erty be subjected to the payment of the debts according to their priority.

The answer of defendants Greenhut and Francis, dated May 29, 1894, alleges that the conveyances to the Peoria Canal Company were made without their knowledge and in fraud of their rights, and asks the Court to appoint a receiver and sell the property for the payment of the debts, as may in equity appear.

The answer of C. E. Crowley, filed May 29, 1894, alleges that the agreement of June 16, 1893, was made without his knowledge or consent and asks that the receiver be directed to sell the property and that his debts be paid.

The answer of R. Toohey, filed May 29, 1894, alleges that the agreement of June 16, 1893, was without his knowledge or consent and asks that the receiver be directed to sell the property, and that his debts be paid.

The answer of John C. Wynd, dated May 26, 1894, states that he is a stranger to all parties to the suit and that by reason of a sheriff's deed he is the owner in fee of all the property and prays the Court to confirm said title.

The answer of J. M. Burnett, filed July 14, 1894, is a demurrer and general denial. Millay & Bennett, attorneys for J. M. Burnett.

The answer of the Gila Bend Reservoir and Irrigation Com-
24 pany is a demurrer that the complaint does not show facts sufficient for cause of action, that it is multifarious and embraces inconsistent claims not properly joined, and a general denial filed June 1, 1894.

Paragraph 6. Defendant introduced the decree of July 21, 1894, in said suit No. 1996.

In which is stated that the Peoria Canal Company took the property, as trustee under the agreement of June 16th, 1893, and that said agreement failed and was incapable of execution and that plaintiffs were creditors to the Arizona Construction Company, prior to the execution of said agreement, and had never assented thereto; that their claims were due and unpaid, and

"It is further ordered, adjudged and decreed by the Court that James McMillan, the receiver heretofore appointed by this Court, and now in possession of said premises under the orders of this Court' proceed to advertise and sell said property and distribute the proceeds as directed in the decree.

Paragraph 7. Defendant introduced the decree of November 20, 1894, in said suit No. 1996.

Which states that it is to read and be in lieu of the decree of July 21, 1894, and states that the Peoria Canal Company took the property as trustee under the agreement of June 16, 1893, and that said agreement failed and was incapable of execution and that plaintiffs herein, and all others for whom they sue in this cause and the defendants C. E. Crowley, Redmond Toohey and John C. Wynd were creditors of the Arizona Construction Company prior to the

execution of said agreement and had never assented thereto and that their claims were due and unpaid.

"Also to Gondolfo and Sanguenetti the further sum of four thousand eight hundred and seventy-seven dollars and eleven cents ($4,877.11), with interest at the rate of seven per cent. since August 28th, 1894, said claim having been filed and allowed against the Arizona Construction Company since the former decree."

"Also pay to Gondolfo and Sanguenetti the sum of $1510.89 with interest thereon at the rate of seven per cent. since August 28, 1894; also pay to E. G. Caruthers the sum of $705.89 with interest thereon at the rate of seven per cent. since October 18, 1893; also pay to Wing Sing the sum of $1509.07 with interest thereon at the rate of seven per cent since October 18, 1893, said claims having been filed and allowed against the Peoria Canal Company since the date of the original decree herein."

"It is further ordered, adjudged and decreed by the Court that on or before the day fixed for the sale hereunder the Gila Bend Reservoir and Irrigation Company pay to Lewis Wolfley the sum of $4840.00 with interest thereon from date thereof at the rate of seven per cent. per annum until paid; also to J. C. Perry the sum
25 of $4,500.00 with interest thereon from date thereof at the rate of seven per cent. per annum until paid; also to E. J. Horton the sum of $16,100.00 with interest thereon from date hereof at the rate of seven per cent. per annum until paid.

Said claims having been filed and allowed herein since the date of the former decree."

"Also pay to Gondolfo and Sanguenetti the sum of $1510.98 with interest thereon at the rate of seven per cent. since August 28, 1894; also pay to E. G. Caruthers the sum of $705.89 with interest thereon at the rate of seven per cent. since October 18, 1893; also pay to Wing Sing the sum of $1509.07 with interest thereon at the rate of seven per cent. since October 18, 1893, said claim having been filed and allowed against the Peoria Canal Company since the date of the original decree herein."

It is further ordered, adjudged and decreed by the Court that James McMillan, the receiver heretofore appointed by this Court, and now in possession of said premises under the orders of this Court, proceed to advertise and sell said property and distribute the proceeds as directed in the decree.

Paragraph 8. Defendant introduced the assignment of errors in suit No. 1996 from I to LXV, inclusive.

Assignments I, II and III allege that the Court erred in refusing to grant a change of venue, and in denying the petition for change of venue, and in retaining jurisdiction after the filing of the petition for change of venue, and the affidavits in support thereof.

Assignments LIII alleges that the Court erred in permitting the sheriff's deed to J. C. Wynd to be offered, over the objection, as no title was claimed under said deed to any portion of the property.

Defendant also offered the motion for new trial, made November

20, 1894, in suit No. 1996, the order denying said new trial, the notice of appeal, and the additional assignment of Errors, being Nos. LXVI to LXX, inclusive, and

That the May term, 1894, of this Court adjourned *sine die,* December 5, 1894.

Assignment of errors LXVII alleges error, in that, no receiver had been appointed in said suit No. 1996, nor had the powers of the receiver of suit No. 1728 ever been enlarged, to give the Court jurisdiction, to so order the receiver of said suit No. 1728.

Paragraph 9. Defendant introduced a report, dated January 3, 1895, and bearing a double heading, viz., title and numbers of suits 1728 and 1996 of this Court, purporting to be a sale of the property herein by James McMillan, receiver under orders and decree in suit No. 1996, as amended November 20, 1894, as stated in the advertisement thereto attached and made a part of said report to
26 one C. E. Crowley and wherein it is stated that over $100,000 of receiver's certificates were still outstanding.

Defendant introduced an order of this Court, dated January 10, 1895, bearing a double heading, viz., title and Nos. of suits 1728 and 1996, in this Court, confirming said sale of January 3, 1895, to said C. E. Crowley, conditioned, that possession of said property should not be given to said Crowley until all the outstanding receiver's certificates were paid off.

Defendant introduced a deed of all the property to C. E. Crowley, purporting to be from a re*ec*iver duly appointed in two equity suits and named therein by title and number, being suits Nos. 1728 and 1996 in this Court, and that the sale was made under orders and decrees made and issued in said suit No. 1996, and signed James McMillan, receiver.

Defendant introduced a deed from said C. E. Crowley conveying said property to the Valley Canal and Land Company and a deed from said Valley Canal and Land Company conveying said property to defendant, The Gila Water Company.

Paragraph 10. Defendant introduced the decree of February 18, 1899, in suit No. 1728, Webster Street, Presiding Judge, wherein it was decreed that defendants go hence without day and to have and recover their costs and charges of plaintiff, also that plaintiff therein perfected an appeal on April 11, 1899, to the Supreme Court of the Territory.

That the Supreme Court of the Territory affirmed said decree of February 18, 1899, on January 26, 1901, and on March 19, 1902, handed down its "finding of facts" in the nature of a special verdict.

I.

That defendant, the Peoria Canal Company, held the property in controversy as trustee, subject to the terms and conditions contained in an agreement dated June 16th, 1893, between the parties hereto. Said agreement being exhibit "G" of plaintiff's complaint herein.

That the sale made by James McMillan, as receiver herein to one C. E. Crowley on January 3rd, 1895, and to J. B. Greenhut, November 23rd, 1898, were made pursuant to and in conformity with the judgment, orders and decrees in suit Number 1996; and that the tax sale to H. C. Mann, C. F. Ainsworth and W. E. Thorne of said property was made while the property in question was in possession of the receiver herein.

II.

States that suit No. 1728 in the District Court of Maricopa
27 county, was commenced September 23rd, 1893, (the purpose hereinbefore set forth, under the head of *Lis Pendens* and said complaint.)

III.

Defendants in answer prayed for specific relief, and to be allowed to issue and sell certificates, which should be a first lien and with which to repair the property.

That the cause was tried November 24, 25, 27, 1893, and evidence closed.

That defendants made application for the appointment of a receiver (said application is given in another paragraph,) also that James McMillan was appointed receiver (said appointment is elsewhere given.)

That on January 4th and 5th, 1894, the cause was argued, submitted and taken under advisement.

IV.

That on May 23d, 1894, certain creditors began suit No. 1996 in District Court, of Maricopa county (the complaint, summons and answers in which are elsewhere given.)

That said action was tried and judgment rendered November 20th, 1894. (Substance of said judgment is elsewhere given.)

V.

That said judgment was appealed to the Territorial and U. S. Supreme Courts and affirmed by said Courts and said receiver, James McMillan, proceeded to advertise and sell the property (as elsewhere stated), and

That October 13th, 1898, plaintiffs, without leave of Court deposited in the clerk's office of said District Court, and had marked as filed a certain paper denominated by it a supplemental complaint in this action, which as stated had been closed and submitted five years before.

On motion of plaintiff based on this supplemental complaint, and without service thereof on the receiver or defendants the District Court made an order directing the receiver to show cause why he should not be restrained from selling said property.

The receiver appeared and showed the Court the decree in said suit No. 1996, and no evidence being offered the motion to restrain was denied, and on November 23d, 1898, said receiver sold said property to J. B. Greenhut. (As stated elsewhere.)

The plaintiff then moved said District Court to restrain the receiver from conveying said property so sold.

This motion not being based on any papers, affidavits or other documents or facts, the receiver justified his proceedings under said decree in suit No. 1996, as before, and the Court denied the
28 motion, no testimony being offered, except the records in this suit and in said suit No. 1996.

February 4th, 1899, said cause was set for final disposition and on February 18th, 1899, was heard and tried by said District Court, no testimony being offered or taken other than that taken and filed November, 1893, and judgment was rendered for defendants and that plaintiff take nothing for its action.

VI.

Plaintiff being the owner of a dam-site and small canal contracted with the Arizona Construction Company to construct a dam and canal and on this ac-ount became indebted to said company in the amount of $721,000.

This indeptedness was secured by deeds of trust on said property, and plaintiff obtained an injunction restraining the trustee's sale, and thereafter plaintiff and said Construction Company made a settlement of all their differences and adjusted all their contracts by the agreement of June 16th, 1893.

No part of plaintiff's indebtedness has been paid, and plaintiff has been insolvent since June 16th, 1893.

VII.

The Peoria Canal Company was organized for the purpose of buying said property at said trustee's sale, but after the execution of said June 16th, 1893, agreement took title and possession thereunder and held the same under the terms of said agreement.

Said Peoria Canal Company issued its bonds and endeavored to sell the same as provided in said June 16th agreement.

The statement of indebtedness required by said June 16th agreement was completed and delivered October 5th, 1893.

The Peoria Canal Company in good faith endeavored to carry out said June 16th agreement.

VIII.

After the June 16th agreement a large portion of the dam was destroyed by a flood and the expense of repairing the same was about $100,000 over the amount estimated to be spent by said agreement.

The receivership and all the rights and interests of the parties to

this suit were rendered necessary to preserve the same, and no want of good faith is anywhere charged in the appointment or acts of said receiver or in the acts or doings of said defendants.

IX.

The plaintiff has not been injured or damaged by any acts of receiver James McMillan or defendants.

29 All acts and doings of receiver James McMillan have been under orders and judgments of the Court appointing him as such receiver and that said receiver was in possession and full control of all the property involved in this action when ordered by the Court in said suit No. 1996 to sell the same, and all the parties hereto were parties to said suit No. 1996, in which all the rights of plaintiff in said property were at issue and as fully determined as they could have been in this action.

X.

Plaintiff's so called supplemental complaint herein was not filed by leave of Court nor was the same served on either of the defendants hereto.

Paragraph 11. Defendant introduced the report made in suit No. 1996, by James McMillan, receiver, of the sale of the property described herein, to J. B. Greenhut of November 23, 1898, wherein it is stated that C. E. Crowley had failed to pay off the outstanding receiver's certificates, and that the receiver had never given possession to said Crowley, and that $18,800 was the best bid and that the sale was made under the amended decree of November 20, 1894, and Jan. 10, 1895, in suit No. 1996, as shown by the advertisement attached and made a part of said report; also

Defendants introduced the order of this Court in suit No. 1996 confirming said sale of November 23, 1898, to said Greenhut, also the deed of the property described herein from James McMillan, receiver, to J. B. Greenhut, said deed on its face purporting to be by a receiver duly appointed in two equity suits, therein designated by title and number and being suits Nos. 1728 and 1996 in this Court and that the sale was made under orders and decrees in suit No. 1996.

Defendants introduced a deed from said J. B. Greenhut for the property described herein to said defendant, The Gila Water Company.

W. C. Foster testified for defendant, that said J. B. Greenhut had taken possession of said property upon receiving the receiver's deed and had placed a keeper in charge thereof, and that the defendant, The Gila Water Company, took possession of the property on receiving the deed from Greenhut and were at the time of the commencement of this action in possession of the property.

Paragraph 12. Plaintiff in defense under the cross-complaint introduced the order of the Court dated May 29, 1894, in suit No. 1996 wherein it is stated that the Court in said suit attempted to enlarge

the powers of James McMillan, as receiver in suit No. 1728, so that

"James McMillan, as such receiver is hereby invested with
30 full possession and such title as to assure the purchasers of such water-rights a complete and perfect title to the same."

Plaintiff also introduced plaintiff's motion for new trial, and the order denying the same, under the judgment of July 21, 1894, in said suit No. 1996 and that plaintiff had in open court given notice of appeal.

Paragraph 13. At this point the Court adjourned the trial saying, "he would take under consideration the right of plaintiff to collaterally attack the proceedings and judgments in said suit No. 1996," and on November 8, 1902, gave judgment in favor — defendant, The Gila Water Company, and

On November 14, 1902, re-opened the case to allow plaintiff to offer its evidence and to make a record thereof, whereupon plaintiff offered the following evidence, which was objected to in detail by defendant, The Gila Water Company, and said objections were sustained by the Court, to-wit:

Paragraph 14. Plaintiff offered affidavit of "bias and prejudice" filed in suit No. 1996, also folios 877, 878, page 213, suit No. 455 in Territorial Supreme Court.

Paragraph 15. Plaintiff offered record of suit No. 1996, being suit No. 455 in the Territorial Supreme Court pages 198, 199,

Which shows that the plaintiffs in suit were all stockholders and officers of the Arizona Construction Company, and that the stockholders of the Arizona Construction Company are the stockholders of the Peoria Canal Company, they are one and the same, also

Paragraph 16. Plaintiff offered the briefs filed by appellant in said suit No. 1996, being suit No. 455 in the Territorial Supreme Court,

Which shows that the question of jurisdiction over the subject matter of said suit, or that the loss of jurisdiction by reason of a perfected appeal or fraudulent collusion was not presented in said briefs to said Supreme Court, also

Paragraph 17. Plaintiff *ordered* the records of suit No. 1996, being suit No. 455 in the Territorial Supreme Court,

Which plaintiff claims shows that no order was made in suit No. 1996 by which the Court could or did acquire control of the property, prior to the hearing and determining of said action, and to show that no officer ever made a return to said Court in said suit No. 1996 showing that the property, or any property, had been taken into the control, or possession of the Court prior to the hearing and determining of said action, and

Which plaintiff claims shows that James McMillan was never appointed receiver therein, and

Which plaintiff claims shows that the Court never acquired jurisdiction over the *res* in said suit No. 1996.

31 Paragraph 18. Plaintiff offered the record of said suit No. 1996, pages 244–5,

Which shows that plaintiff perfected said appeal, as provided for in Sections 859–861, R. S. of A., 1887, on November 12, 1894, by bond duly approved and filed in this Court.

Paragraph 19. Plaintiff offered the records of said suit No. 1996, page 267,

Which shows that the transcript on appeal was delivered by the clerk of this Court on January 9, 1895,

Paragraph 20. Plaintiff offered the records of suits Nos. 1728, being suit No. 696 in the Territorial Supreme Court and said 1996,

Which shows that the decree and order of January 10, 1895, and the deeds given to C. E. Crowley and J. B. Greenhut by James McMillan, receiver, did not form any portion of said suits as appealed and has never been affirmed by any appellate court.

Paragraph 21. In deraignment of its title plaintiff—

Offered the records of said suit No. 1728, pages 31 to 45,

Which shows that plaintiff filed a supplemental complaint therein after first serving a copy thereof on the attorneys of record in said suit, as the endorsements on the original complaint on file in said suit No. 1728 will show,

And by said supplemental complaint attempted to maintain its right, title and interest in and to the property herein.

Paragraph 22. Plaintiff offered page 45 of record of said suit No. 1728,

Which shows that under said complaint plaintiff endeavored November 2, 1898, to have James McMillan, receiver therein, restrained from selling plaintiff property without orders in said suit No. 1728.

Paragraph 23. Plaintiff offered records of said suit No. 1728, page 48,

Which shows that plaintiff on November 23, 1898, endeavored to have James McMillan, receiver, restrained from deeding or giving possession of plaintiff's property to J. B. Greenhut, or any other person or persons until so ordered in that suit.

Paragraph 24. Plaintiff offered plaintiff's motion in the Territorial Supreme Court in said suit No. 1728,

Which shows that plaintiff moved for a rehearing of the "finding of facts" by said Court and said hearing was denied April, 1902.

Paragraph 24. Plaintiff offered records of said suit No. 1728, being suit No. 696 in the Territorial Supreme Court,

Which plaintiff claims shows that James McMillan re-
32 ceiver therein, was never ordered or authorized by any orders therein, to sell or otherwise dispose of the property in his hands, as such receiver.

Paragraph 26. The Court gave judgment for defendant, the Gila Water Company, November 15, 1902, as prayed for in its cross-complaint, and

Plaintiff moved for a new trial as provided for by Section 1472 to 1476, R. S. of A., 1901, as follows:

I.

That the Court erred in dismissing plaintiff's suit, after plaintiff had established an equitable interest, through certain agreement of June 16th, 1893, and that the property was in the hands of a receiver of this Court, and that all parties to said agreement and said receiver had answered herein, disclaiming any right, title or interest in or to said property.

II.

The evidence does not sustain the judgment rendered on this cross-complaint,

III.

The court erred at the trial under the cross-complaint in admitting evidence offered by the defendants.

IV.

The Court erred at the trial under the cross-complaint in excluding evidence offered by the plaintiff.

V.

That the judgment is contrary to law, and the Court denied plaintiff's motion for a new trial, November 22, 1902, and the plaintiff gave notice of appeal in open court, and on November 24, 1902, filed its bill of exceptions.

Plaintiff filed statement of facts, November 26, 1902, under Section 1491, R. S. of A., 1901, which was struck out November 29, 1902, by the Court, on motion of defendant.

Plaintiff again filed statement of facts, December 10, 1902, under Section 1491, R. S. of A., 1901, which was struck out December 13, 1902, by the Court on motion of defendant.

Plaintiff prepares his bill of exceptions to the rulings of the Court and annexes all the circumstances and evidence necessary in explanation thereof, and presents the same to the judge trying said cause, and asks that it be certified to as correct, and signed by the judge, and filed as a part of the record — said cause, and the judge, having amended the same as to form, and having considered and acted on the amendments, objections and suggestions of the opposite side, certifies the same to be correct and affixes his official
33 signature hereto as of the date of November 24, 1902, as provided in Section 1466 of R. S. of A. of 1901, that being the date of the serving on defendant and of the filing of said bill in the clerk's office of this Court.

EDWARD KENT, *Judge.*

Endorsed. Filed Feb. 25, 1903. Elias F. Dunlevy, Clerk.

(Title omitted.)

Assignment of Errors.

Comes now the above named plaintiff and assigns in the above entitled cause the following errors:

1. That the Court erred in dismissing plaintiff's complaint, for the reasons set forth in Exception 1, of the bill of exceptions herein.

2. That the Court erred in allowing defendant, The Gila Water Company, to introduce in support of its cross-complaint the summons, complaint, exhibits and answers, in suit No. 1996 of this Court, for the reasons set forth in Exception 2, of the bill of exceptions herein.

3. That the Court erred in allowing defendant, The Gila Water Company, to introduce in support of its cross-complaint, the application for and the appointment of James McMillan, as receiver in suit No. 1728 for the reasons set forth in Exception 3, of the bill of exceptions herein.

4. That the Court erred in allowing defendant, The Gila Water Company, to introduce in support of its cross-complaint, the judgment of July 21st, 1894, and November 20th, 1894, for the reasons set forth in Exception 4, of the bill of exceptions herein.

5. The Court erred in refusing to allow plaintiff to show that there was no order directing the taking the property into the custody of the Court in suit No. 1996 in this Court, as is further shown in Exception 5, of bill of exceptions herein.

6. That the Court erred in refusing to allow plaintiff to show that there was no report of any officer, showing or tending to show that the property in controversy had ever been taken into custody of the Court in said suit No. 1996, and as is further shown in Exception 6, of the bill of exceptions herein.

7. That the Court erred, paragraph 13 of evidence, in refusing to allow plaintiff to introduce any evidence to show that the proceedings in said suit No. 1996 in this Court were void, and in ruling without first allowing plaintiff to offer said evidence.

34 That the double headings (being title and number of said suits No. 1728 and 1996 in the report by James McMillan of sale to C. E. Crowley of January 3d, 1895, and of said double headings in the decree of this Court of January 10th, 1895, confirming said sale,) show that plaintiff had consented and that the Court had acted on the theory that said suits Nos. 1728 and 1996 were consolidated and that the said James McMillan was thereby conceded by plaintiff to be receiver in both of said suits.

It was error for the reason that the dates of said double headers show that they were long after said suit No. 1996 had been finally appealed from that term of Court ended, and the transcript had been delivered, also for the reason set forth in Exception 7, of the bill of exceptions herein.

8. That the Court erred in allowing defendant, The Gila Water

Company, to introduce the judgment of November 20th, 1894, in suit No. 1996, and in refusing to allow plaintiff to show that the Court had lost jurisdiction, for the reasons set forth in Exception 8 of the bill of exceptions herein.

9. That the Court erred in allowing defendant, The Gila Water Company, to introduce the report of a sale made by James McMillan, receiver, on January 5th, 1895, to one C. E. Crowley; also the Court erred in allowing said defendant to introduce the order of Court of January 10th, 1895, confirming said sale to said Crowley.

The same being immaterial and irrelevant said sale never having been perfected, as shown by paragraph 11 of evidence herein, and for the reasons set forth in Exception 9 of the bill of exceptions herein.

10. That the Court erred in allowing defendant, The Gila Water Company, to introduce the deeds to C. E. Crowley of January 10th, 1895, and to J. B. Greenhut of November 26th, 1898, for the reasons set forth in Exception 10 of the bill of exceptions herein, and the deed to said Crowley being in material and irrelevant said Crowley never having perfected said purchase, as shown by paragraph 11 of evidence herein.

11. That the Court erred in refusing to allow plaintiff to show that it filed a supplemental complaint in said suit No. 1728, after first serving the same on the attorneys of record in said suit, and that thereunder it attempted to maintain its rights, as shown by Exception 11 of the bill of exceptions herein.

12. That the Court erred in refusing to allow plaintiff to introduce evidence showing that under said suit No. 1728 plaintiff continued to attempt to protect its interest in the property in controversy, as late as April, 1902, as shown by Exception 12 of the bill of exceptions herein.

13. That the Court erred in refusing to allow plaintiff to show that receiver James McMillan was never authorized by any
35 order in said suit No. 1728 to dispose of the property in his hands as such receiver, as shown by Exception 13, of the bill of exceptions herein.

14. That the Court erred in refusing to allow plaintiff to introduce its motion of "bias and prejudice," thereby showing that the Court had lost its jurisdiction over said suit No. 1996, after the filing of said affidavit and motion, as shown by Exception 14 of the bill of exceptions herein.

15. That the Court erred in refusing to allow plaintiff to introduce appellant's briefs in said suit No. 1996, being suit No. 455 in the Territorial Supreme Court, for the purpose of showing what questions of jurisdiction had been presented to that Court, as shown by Exception 15 of the bill of exceptions herein.

16. That the Court erred in refusing to allow plaintiff to introduce the records of said suit No. 1996 to show that no jurisdiction over the RES had been acquired in that case, as shown by Exception 16, of the bill of exceptions herein.

17. That the Court erred in refusing to allow plaintiff to show that all the plaintiffs in said suit No. 1996 were stockholders in the defendants, the Arizona Construction Company and Peoria Canal Company, as shown by Exception 17 of the bill of exceptions herein.

18. That the Court erred in giving judgment for defendant, The Gila Water Company, and in not giving judgment for plaintiff, as shown by Exception 18 of the bill of exceptions herein.

19. That the Court erred in denying plaintiff's motion for new trial, as shown by Exception 19 of the bill of exceptions herein.

J. B. WOODWARD,
Attorney for Plaintiff.

(Title omitted.)

Affidavit in lieu of bonds to pay costs of Appeal or give security therefor. Section 1507, R. S. of A., 1901.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

Before me the Probate Judge of the above named County, appeared Lewis Wolfley, who being duly sworn, on oath says:

That he is president of the Gila Bend Reservoir & Irrigation Company, plaintiff in the above entitled action, and that said company is duly incorporated under the laws of Arizona, and is a bona-fide resident of said Territory.

Affiant further on oath states that said plaintiff has no property or other assets than those involved in this action, and that said plaintiff is absolutely unable to pay the costs of appeal or give security therefor.

36 This affidavit is made in lieu of bond to pay costs or give security therefor, as provided for in Section 1507, R. S. of A., 1901.

LEWIS WOLFLEY.

Sworn to and subscribed before me this 27th day of February, 1903.

[SEAL.] J. C. PHILLIPS,
Probate Judge.

Supreme Court of the Territory of Arizona.

(Title of Cause.)

You will please take notice that I will move this court at the Court House in the City of Phœnix, County of Maricopa, Arizona, at the next meeting of said court, for an order to strike from the files of

this court the Abstract of Record filed by you herein, for the reasons specified in the annexed motion papers.

Dated, Phœnix, Arizona, April 3rd, 1903.

Yours, etc., C. F. AINSWORTH,
Attorney for Appellee.

To J. B. Woodward, Esq., attorney for appellant.

Supreme Court of the Territory of Arizona.

(Title of Court and Cause.)

Comes now the above named appellee and moves this court to strike from the files of this court the Abstract of Record in the above entitled action, filed herein by the Appellant, for the reason that said Abstract of Record does not comply with Rule 1 of this court, entitled "Abstract of Record," in this,

1st. The Abstract of Record does not contain the Findings of Fact and Conclusions of Law of the District Court, made and filed in this cause.

2nd. The Abstract of Record does not contain or purport to contain a copy of any of the exhibits or any evidence, the exclusion of which by the District Court, the appellant urges as error.

3rd. The Assignments of Error embodied in the abstract of record do not contain a distinct and specific statement of the grounds of error complained of.

4th. The Abstract of Record does not contain or purport to contain a copy of any of the exhibits or the material portions thereof, nor the evidence which the appellant claims to have offered upon the trial of this cause, and the exclusion of which it alleges as error.

5th. The Abstract of Record does not contain or purport
37 to contain a copy of any of the exhibits or the material portions thereof, nor the evidence which the appellant claims was offered by the appellee upon the trial of this cause, and the admission of which the appellant claims was error.

6th. The Abstract of Record does not contain so much of the record as is necessary to inform the court of the errors relied on without an investigation of the record itself.

C. F. AINSWORTH,
Attorney for Appellee.

Endorsed: Service accepted this 4th day of April, 1903, J. B. Woodward, Attorney for Appellant,—No. 827. Supreme Court, Territory of Arizona. Gila Bend Reservoir & Irrigation Co., appellant, *vs.* Gila Water Co., appellee. Motion to strike Abstract of Record from files. C. F. Ainsworth, Attorney for Appellee. Filed April 21, 1903, S. M. Cullom, Clerk.

Supreme Court of the Territory of Arizona.

(Title of Court and Cause.)

Comes now the Appellant in the above entitled Cause and shows to the Court:

That whereas Appellee has in its Brief herein called attention to the fact, that Appellant's transcript herein has failed to incorporate therein, the "findings of fact and conclusions of law" of the Trial Court, and,

Whereas said omission was unintentional on Appellant's part, and,

Whereas Appellant was not aware of said omission, until attention was called thereto by Appellee's brief, and,

Whereas the said "findings of fact and conclusions" of law were as follows, viz:

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

(Title of Cause.)

This cause coming on regularly to be heard before the Court without a jury on the 23rd day of October, 1902, the plaintiff appearing by its attorney, and the defendants herein appearing by their attorney and said defendants, excepting the Gila Water Company having filed their answer disclaiming any right, title or interest in or to the property mentioned and described in the complaint, or to any part thereof and the plaintiff having introduced its testimony to sustain the allegations of its complaint, whereupon on motion of the defendant the Gila Water Company, a corporation, the action of the plaintiff as against the defendants was dismissed, and there-
38 upon the defendant, The Gila Water Company, a corporation, introduced its testimony to sustain the allegations of its cross-complaint, and the arguments of the counsel for the respective parties in said action, having been submitted to the court, and court having taken the matter under advisement, and the court being fully and sufficiently advised in the premises, now on this 8th day of November, 1902, makes and files its findings of fact and conclusions of law herein.

Findings of Fact.

I.

The Court finds that the plaintiff the Gila Bend Reservoir and Irrigation Company and the defendants the Peoria Canal Company, The Valley Canal and Land Company and the Gila Water Company, are corporations duly organized under the laws of the Territory of Arizona, and have heretofore been doing business in the County of

Maricopa, Territory of Arizona, and that the defendant The Arizona Construction Company is a corporation duly organized under the laws of the State of Illinois, and has heretofore been doing business in the County of Maricopa, Arizona, and that C. F. Ainsworth is a resident of the City of Phœnix, Maricopa County, Arizona; that James McMillan, receiver, J. C. Wynd, H. C. Mann, J. B. Greenhut, W. E. Thorne and C. E. Crowley are non residents of the territory of Arizona.

II.

That all of the parties to this action have appeared herein by their attorneys, and that the Court has jurisdiction over the parties and the subject matter of the action.

III.

That all the defendants except the Gila Water Company, a corporation, filed herein their answer disclaiming any right, title or interest in or to the property or any part thereof, mentioned and described in the complaint herein and hereafter set forth; and thereupon the court finds that all of said defendants above named except The Gila Water Company, a corporation, have no right, title or interest in or to the property or any part thereof, mentioned and described in the complaint herein and hereinafter set forth.

IV.

That the plaintiff herein The Gila Bend Reservoir and Irrigation Company, a corporation, has not now and did not have at the commencement of this action any cause of action in respect to,
39 neither did it have and it has not now any right, title or interest in or to the property or any part thereof, mentioned and described in the complaint herein and hereinafter set forth.

V.

That the defendant The Gila Water Company, a corporation, was at the time of the commencement of this action and is now the owner in fee simple and in possession of, all of the property mentioned and described in the plaintiff's complaint herein and hereinafter set forth.

As Conclusions of Law the Court Finds:

I.

That the plaintiff's action should be dismissed as against all of the defendants herein, and that said defendants have and recover of and from the plaintiff, their costs and disbursements incurred herein.

II.

That the defendant The Gila Water Company, have judgment in accordance with the prayer of its cross-complaint, adjudging it and decreeing it to be the owner in fee simple and in possession of all of the property mentioned and described in the complaint herein and that the plaintiff and all of the other defendants be adjudged to have no right, title or interest in and to the said property or any part thereof, and that the plaintiff The Gila Bend Reservoir and Irrigation Company, a corporation, and all persons claiming or to claim said premises and property or any part thereof, through or under said plaintiff, be perpetually enjoined and forever barred and estopped from hereafter claiming any right, title or interest in or to the property or any part thereof, mentioned and described in the complaint herein and hereinafter set forth.

The property hereinabove referred to and described in the complaint herein, is described as follows:

(Description of property same as in Complaint, omitted here.)

Let judgment be entered herein accordingly.

Dated Phœnix, A. T., November 8th, 1902.

EDWARD KENT, *Judge.*

Therefore Appellant moves the Court for a diminution of the record, and that said "findings of fact and conclusions" of law be considered to all intents and purposes, the same as though said "findings of facts and conclusions" of law had formed part of said transcript.

J. B. WOODWARD,
Attorney for Appellant.

40 Endorsed: Service of copy accepted this 7th day of May, 1903. C. F. Ainsworth per I. J. L., Attorney for Appellee. No. 827. In the Supreme Court, Territory of Arizona, Gila Bend Reservoir & Irrigation Co., Appellant, *vs.* Gila Water Co., *et al.*, Appellees. Suggestion of Diminition of Record. Filed May 11, 1903, S. M. Cullom, Clerk.

In the Supreme Court of the Territory of Arizona.

(Title of Cause.)

Appeal from the District Court of Maricopa County. Hon. Edward Kent, Judge.

J. B. Woodward for Appellant, C. F. Ainsworth for Appellee.

Opinion by Sloan, J.

The Gila Bend Reservoir and Irrigation Company, brought suit in the court below. Alleging that it was the owner in fee simple of a

certain irrigating canal, with its branches; certain water rights connected therewith, and certain tracts of real estate in township, 2 north, range 5, west, Maricopa county, and asking that its title be quieted as against the Gila Water Company and certain other defendants who were alleged to claim interests adverse to it in said property.

The Gila Water Company answered setting up title in itself and asked that its title be quieted as against the plaintiff. The other defendants filed disclaimers and were dismissed from the suit.

The issues were tried by the court below and judgment rendered in favor of the Gila Water Company, dismissing plaintiff's complaint and decreeing the said Gila Water Company to be the owner in fee of the property in controversy.

The Gila Bend Reservoir and Irrigation Company moved for a new trial, which was denied, and, from this ruling and the judgment, has appealed to this court.

Upon the trial the Gila Water Company introduced in evidence to sustain its claim of title to the property in controversy, the record and judgment in a suit in which one W. H. Linn and others were plaintiffs and the Gila Bend Reservoir and Irrigation Co., and others were defendants, and known on the docket of the District Court of Maricopa County, where the suit was brought, as case number 1996.

The plaintiff, the Gila Bend Reservoir and Irrigation Company objected to the introduction of this judgment and record upon the ground of certain irregularities appearing upon the face of the
41 record which it claimed rendered the judgment open to attack in this proceeding. The rulings of the trial court, in admitting this record and judgment, constitute the essential grievance of the appellant.

It appears that in the District Court of Maricopa county, in the year 1893, the appellant brought suit against the Peoria Canal Company and the Arizona Construction Company and applied for a receiver therein to take possession of the property in controversy in this action. Thereafter the Court appointed one James McMillan as such receiver who took possession of the property and, by leave of the Court, issued a large amount of receiver's certificates to meet the expenses of necessary improvements upon the property. This suit was docketed as number 1728. Pending this action, one W. H. Linn, and others, brought suit in the District Court of Maricopa County, against the appellant and other defendants, alleging in their complaint, among other facts, the pendency of action number 1728, the appointment of the receiver and the issuing of the receiver's certificates, and praying, among other things, that the assets of the Gila Bend Reservoir and Irrigation Company be marshalled and that the receiver take possession of and be directed to sell the property of the said company and from the proceeds of said sale pay the debts adjudged due against it.

All the parties to this suit, including the Gila Bend Reservoir and Irrigation Company, appeared and answered. A trial was had and

judgment was rendered in which the receiver was directed to sell the property. The record further discloses that a sale was made under this judgment by the receiver, which was affirmed by the court, and a deed executed by the said receiver to the purchaser, who was one of the grantors of the appellee. This judgment was appealed from to this court where it was affirmed, and subsequently an appeal was taken by the appellant to the Supreme Court of the United States where the judgment of this court was affirmed. The latter suit in the court below was docketed as number 1996. The objection which the appellant urged in the court below to the judgment in cause number 1996 was that it appears upon the face of the record that the judgment, ordering a sale of the premises by the receiver, was without jurisdiction and void for the reason that no order was made by the court extending the receivership in suit number 1728 to cause number 1996. In passing upon this objection the trial court pointed out that all the parties in cause number 1728 were parties in cause number 1996, that, when the latter suit was brought, the property was in the hands of the court, through its receiver, and that after the bringing of cause number 1996, the record disclosed that the
42 court and all the parties, including the Gila Bend Reservoir and Irrigation Company, treated the property in possession of the receiver, appointed in cause number 1728, as though it had been placed in his possession as a receiver appointed in cause number 1996, and, further that orders were made by the court concerning said receivership which were entitled in both suits jointly, and held that, although no order was made consolidating the two suits and no order was in terms, made extending the receivership to the second suit, number 1996, the receivership was in fact extended to the second suit, and that the court, by its action, ratified the acts of the receiver in the second suit and thereby, in effect, extended his power and authority as such receiver to said second suit.

The view thus taken is amply justified by an inspection of the record in the two suits, and upon this ground alone the action of the trial court, in admitting the judgment, was correct.

The trial court did not err for another reason. The failure of the court, in case number 1996, to enter a formal order extending the receivership from cause number 1728 to cause number 1996, was not one which rendered the judgment complained of void upon its face but was a mere irregularity of practice which should have been taken advantage of during the pendency of the action.

As said by Mr. Justice Miller in Cooper *vs.* Reynolds, 10 Wallace, 308: "It is of no avail to show that there are errors in the record, unless they be such as to prove that the court has no jurisdiction in the case, or that the judgment rendered was beyond its powers. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law."

In Cornett *vs.* Williams, 20 Wallace, 226, we find this expression of the Supreme Court: "The settled rule of law is that jurisdiction having attached to the original case, everything done within the

power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached by fraud.

It was within the power of the court to have extended the receivership in cause number 1728 to cause number 1996. It having jurisdiction of the property and the parties, the appellant had a right to object to the extension of the receivership so as to cover both cases without a formal order made and entered in that behalf. It could likewise have moved to set aside the judgment for this or any other, irregularity that affected it. If it did not take any such action it must be held to have waived the error. If it took any such action, the ruling of the court thereon, having been reviewed by this court and the Supreme Court, cannot now be reviewed in this suit,
43 and the judgment in cause number 1996, was conclusive and not subject to collateral attack by appellant.

The judgment is affirmed.

RICHARD E. SLOAN,
Associate Justice.

We concur.

FLETCHER M. DOAN,
Associate Justice.

GEO. R. DAVIS,
Associate Justice.

Endorsed. No. 827. The Gila Bend Reservoir and Irrigation Company, Appellant, *vs.* Gila Water Company, Appellee. Opinion by Sloan, J. Recorded Book 5, Pages 485–488. Filed March 26, 1904, S. M. Cullom, Clerk.

Supreme Court of the Territory of Arizona.

(Title of Court and Cause.)

Motion for Rehearing.

Comes now the appellant and moves the court for a rehearing for the following reasons:

I.

Suit No. 1996 under which appellee claims title, was a suit *in rem,* for the sale of certain property therein described. No judgment was asked or given against the defendants, or any one of them.

The property was in the hands of a receiver in suit No. 1728.

The failure to make the receiver a party to suit No. 1996, or to consolidate said suits was jurisdictional and failure so to do rendered the entire proceedings in suit No. 1996 absolutely void, and the court erred in not so declaring.

II.

Failure to comply with the forms of law renders the entire proceedings *coram non judice*. . .

Dyues *vs.* Hoover, 20 How. 80.

Unless the jurisdictional facts appear the judgment is void.

Boswell *vs.* Otis 9 How. 350.

Galpin *vs.* Paige 18 Wall. 365.

Thompson *vs.* Whitman 18 Wall. 466.

And the court erred in not so declaring.

III.

When from any cause a Court has no jurisdiction of the
44 subject matter, neither an appearance or consent, nor pleading to the merits and going to trial, will give the court jurisdiction.

Vol. 12 Am. & Eng. Enc. 301.

And the court erred in not so declaring.

IV.

Failure to consolidate suits No. 1728 and 1996 before judgment rendered the judgment in suit No. 1996 absolutely void for want of jurisdiction over the *res*.

Guaranty Trust Co., *vs.* Green Cove R. R., 139 U. S. 146.

And the court erred in not so declaring.

V.

The finding that appellant treated the Receiver of suit No. 1728 as being also Receiver in suit No. 1996 is an error of fact, and contrary to the evidence.

VI.

In said suit No. 1996 appellant filed an affidavit of " bias and prejudice" and petitioned for a change of venue, as shown in paragraph 8 of evidence, page 25 of Transcript, and that appellant offered no defense in said suit No. 1996 as shown by exception 14, pages 26 of Transcript, and could not be held to have agreed to anything therein, and the court erred in not so declaring.

VII.

The findings that "Orders" were made entitled in both suits jointly is an error of fact, as the record shows, that no order was so made until after the appeal had been perfected and Transcript delivered in said suit No.1996 and then in only one single instance, and the sale of appellee was under orders headed only as 1996.

The order entitled with the double heading was made January 10th, 1895.

Paragraph 9 of evidence herein, page 36 of Transcript.

The Transcript on appeal in said No. 1996 was delivered on January 9th, 1895.

Paragraph 19 of evidence herein, page 44 of Transcript, and paragraph 11 of evidence herein, page 41 of Transcript, shows that the order of the Court confirming the sale to Greenhut, under which appellee derives its title, contained the heading of suit No. 1996 alone, and the court erred in not so declaring.

VIII.

That even had the trial court jurisdiction, the fraudulent collusion in said No. 1996 rendered the proceedings therein void, as shown in appellant's Brief herein, pages 25 to 29 inclusive.

45 That even had the trial court had jurisdiction it had lost jurisdiction before judgment by reason of the petition for a change of venue and the filing of the affidavit of bias and prejudice, as shown in Exception 14 herein, page 26 of Transcript, and paragraph 8 of evidence herein, page 35 and as is argued in appellant's Brief, pages 37 to 40 inclusive, and the court erred in not so declaring.

IX.

That even had the trial court had jurisdiction it had lost jurisdiction prior to the judgment of November 20, 1894 under which appellee derives title which was rendered "in lieu" of the judgment of July 21st, 1894, appellant having perfected an appeal from said judgment of July 21st, 1894 as shown by paragraph 18 of evidence herein, page 43 of Transcript, and as argued in appellant's Brief, pages 40 to 44 inclusive and the court erred in not so declaring.

J. B. WOODWARD,
Attorneys for Appellant.

Endorsed. Service of copy accepted this 4th day of April, 1904, C. F. Ainsworth, Attorney for Appellee.—No. 827. Supreme Court of the Territory of Arizona. Gila Bend Reservoir & Irrigation Co., plaintiff and appellant, *vs.* The Gila Water Co., defendant and appellee. Motion for rehearing. Filed April 4, 1904, S. M. Cullom, Clerk.

Supreme Court of the Territory of Arizona.

(Title of Court and Cause.)

Affidavit of Value.

Comes now the Appellant, through its President, Lewis Wolfley, who being first duly sworn, makes affidavit, that the values involved in the above entitled cause, far exceeds the sum of five thousand dollars, and this affidavit is made in compliance with, and is intended

to comply with the United States Statute governing appeals from the Territorial Supreme Court to the United States Supreme Court.

LEWIS WOLFLEY.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

Before me, Lavina M. Andrews, a Notary Public in and for said County and Territory, on this day personally appeared Lewis Wolfley known to me to be the person whose name is subscribed to the foregoing instrument as President of the Gila Bend Reservoir and
46 Irrigation Company, and acknowledged to me that he executed the same for said company, and swears the same is true.

Given under my hand and seal of office, this 31st day of October, A. D., 1904.

LAVINA M. ANDREWS,
Notary Public.

[SEAL.]

My commission expires Sept. 26, 1908.

Endorsed.—No. 827. Supreme Court of the Territory of Arizona. Gila Bend Reservoir and Irrigation Company, appellants, *vs.* The Gila Water Company, appellee. Affidavit of Value. Filed Oct. 31, 1904, S. M. Cullom, Clerk.

Supreme Court of the Territory of Arizona.

(Title of Court and Cause.)

Motion of Appellee for an order directing the return of the record and papers herein to the Clerk of the District Court.

Comes now the above named appellee, and shows to this court that heretofore this court rendered its decision herein affirming the decision of the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, in favor of the above named appellee. That upon the rendering of such decision as aforesaid, the appellant herein moved this court for a rehearing, but that this court denied such motion. That more than fifteen days have elapsed since the denial to the appellant of such rehearing, and that no appeal to the Supreme Court of the United States has as yet been perfected.

That all of the above matters appear more fully from the records of this court to which reference is hereby made as a part of this motion.

Therefore, for the reasons above stated, appellee herein respectfully moves this court for an order directing the remittance of the record and all papers in the above action, by the clerk of the Su-

preme Court of the Territory of Arizona, to the Clerk of the District Court of the Territory of Arizona, in and for Maricopa County, in the form and manner required by the Statute in such case made and provided. Respectfully submitted.

C. F. AINSWORTH,
Attorney for Appellee.

Endorsed. No. 827. In the Supreme Court of the Territory of Arizonia. Gila Bend Reservoir and Irrigation Company, Appellant, *vs.* Gila Water Company, Appellee. C. F. Ainsworth, Attorney for Appellee. Motion for Remittitur. Filed January 9, 1905, S. M. Cullum, Clerk.

Service of the within copy admitted this 9th day of January, 1905.

____ ____
Attorney for Appellant.

47 Supreme Court of the Territory of Arizona.

(Title of Court and Cause.)

Motion of the Appellant to Deny Remittitur.

Comes now the above named appellant and shows to the Court that after its motion for rehearing had been denied by this Court, appellant filed motion for "Findings of Fact in the nature of a special verdict" as contained in said motion.

Appellant further shows to the Court that it has no knowledge of any action being taken upon said motion for Findings of Fact in the nature of a special verdict, or that any facts in the nature of a special verdict have as yet been found by the Court, and that appellant has therefore been unable to make its assignment of errors and perfect its appeal.

Appellant further shows to the Court that the Revised Statutes of the United States, Sections 702 and 1008, provide that appellant should have two years within which to perfect and make good its appeal.

And therefore appellant prays the Honorable Court to deny the motion of the appellee for a remittitur upon the ground that "no appeal to the Supreme Court of the United States has now been perfected" by appellant.

J. B. WOODWARD,
Attorney for Appellant.

Endorsed.—No. 827. In the Supreme Court of the Territory of Arizona. Gila Bend Reservoir & Irrigation Co., *vs.* Peoria Canal Company, *et al.* Motion to Deny Remittitur. Filed January 13, 1905, S. M. Cullum, Clerk.

(Title of Court and Cause.)

Supreme Court of the Territory of Arizona.

Statement of facts in this case in the nature of a special verdict made by the supreme court of the Territory of Arizona, and also rulings of the court below on the admission and rejection of evidence as excepted to on the foregoing transcript of the record in the above entitled cause, to be used by appellant herein in its appeal to the Supreme Court of the United States.

48 That the above entitled cause was tried in the Court below upon the complaint which was the statement of a cause of action to quiet title to the property described in said complaint against the defendants therein mentioned; the amended answer of the Gila Water Company, one of the said defendants, denying the plaintiff in said complaint being the owner of the property therein described, said defendant further alleging peaceable and adverse possession of the property described in plaintiff's complaint under the title and color of title for more than three years preceding the date of the commencement of the above action, and also alleging peaceable and adverse possession of said property for more than five years before the commencement of the suit using and enjoying the same, paying taxes thereon, claiming under deeds duly recorded; the cross complaint of said defendant, Gila Water Company, claiming to be the owner in fee simple of all the property described in plaintiff's complaint in said cause; and the answer of appellant herein to said Gila Water Company's cross complaint;

That all of the other defendants mentioned in said complaint answered and disclaimed any right, title and interest in and to the property described in said complaint.

That this Supreme Court adopts and makes a part of this statement of facts the Bill of Exceptions in this case, Part I, Exceptions, Part II. Circumstances and Evidence, as certified and signed on the 24th day of November, 1902, by Hon. Edward Kent, the Presiding Judge who tried this cause below, the same as if it were set forth at length herein:

That no order was made in the court below consolidated the case known as No. 1728 in the trial court and the case known as No. 1996 in the same court, said cases being those the record of which is referred to in the above mentioned Bill of Exceptions;

That the receiver appointed in said case No. 1728 made the sale and executed the deed under which the Gila Water Company, appellee, claims title to the property in dispute; that no order was in terms made extending the receivership in said case No. 1728 to said case No. 1996, the latter case being the one in which said receiver made said sale and by the judgment rendered therein assumed to convey the title to said property; that the only orders made in said case No. 1996 relating to said receivership are those dated May 29,

1894, November 23, 1898, July 21, 1894, November 20, 1894 and January 10, 1895, referred to in said Bill of Exceptions.

That from the foregoing record and facts, the Court finds that plaintiff and appellant herein, Gila Bend Reservoir and Irrigation Company, a corporation, has not and did not have at the commencement of this action any cause of action in respect to, nor did it have and has not now any right, title or interest in and to the
49 property or any part thereof mentioned and described in the complaint herein; that the defendant-appellee, Gila Water Company, a corporation, was at the time of the commencement of this action and is now the owner in fee simple and in possession of all the property mentioned and described in plaintiff's complaint herein.

Allowed and certified by the Court this 21st day of February, 1905.

RICHARD E. SLOAN,
Associate Justice, Presiding.

Endorsed: No. 827. In the Supreme Court of the Territory of Arizona. Gila Bend Reservoir and Irrigation Company *vs.* Peoria Canal Company, *et al.* Statement of Facts in the nature of a Special Verdict. Filed February 23, 1905, S. M. Cullom, Clerk.

Supreme Court of the Territory of Arizona.

(Title of Court and Cause.)

Petition for Appeal.

Comes now the above named appellant and believing itself aggrieved by the final judgment entered by the Supreme Court of the Territory of Arizona on the 26th day of March, 1904, in the above entitled cause, in which the judgment of the District Court of the Third Judicial District of the Territory of Arizona was affirmed, and which said judgment of the said Supreme Court was rendered on the appellant having brought said judgment of said District Court to said Supreme Court for review on appeal, praying for the reversal of the same and remanding it back to said court below for a new trial, appellant having heretofore filed its affidavit showing the value of the matter in dispute, to-wit: the value of the property in controversy, exceeding the sum of Five Thousand Dollars,

Therefore, the said appellant hereby appeals from said judgment of said Supreme Court of the Territory of Arizona to the Supreme Court of the United States and prays that its appeal may be allowed, that the amount of the cost bond on appeal be fixed by order of this Court, that proper citation be issued herein, and that a transcript of the record and proceedings, judgment, decision and opinion, together with the statement of facts in the nature of a special verdict

in this cause be certified and duly authenticated and sent to the Supreme Court of the United States.

J. B. WOODWARD,
Attorney for Appellant.

Endorsed: No. 827. In the Supreme Court of the Territory of Arizona. Gila Bend Reservoir and Irrigation Company, *vs.* Gila Water Company. Petition for Appeal. Filed March 13, 1905, S. M. Cullom, Clerk.

Supreme Court of the Territory of Arizona.

(Title of Court and Cause.)

Now on this 13th day of March, 1905, the appeal prayed for in the foregoing petition is hereby allowed, the value of the matter in dispute, to-wit: the value of the property in controversy, exceeding the sum of Five Thousand Dollars, citation to issue on appellant filing a bond in the penal sum of One Thousand Dollars with good and sufficient sureties as is required by law to be approved by an Associate Justice of the Supreme Court of the Territory of Arizona, and remittitur stayed for sixty days.

RICHARD E. SLOAN,
Associate Justice of the Supreme Court of the Territory of Arizona.

Endorsed.—No. 827. In the Supreme Court of the Territory of Arizona. Gila Bend Reservoir and Irrigation Company, *vs.* Gila Water Company. Allowance of Appeal. Filed March 13, 1905, S. M. Cullom, Clerk.

Supreme Court of the Territory of Arizona.

(Title of Court and Cause.)

Know all men by these presents:

That we, The Gila Bend Reservoir and Irrigation Company as principal, and the United States Fidelity and Guaranty Company, as surety, do hereby acknowledge ourselves to be firmly held and bound to the Gila Water Company, the Appellee herein in the sum of One Thousand Dollars to be paid to it, its successors or assigns, for which payment well and truly to be made we bind ourselves and each of us, and each of our successors and assigns, both jointly and severally, firmly by these presents:

The condition of the above obligation is such that the above named appellant has prayed for and been granted an appeal herein to the Supreme Court of the United States upon filing a bond in the penal

sum of one thousand dollars, with good and sufficient sureties as required by law, to be approved by an Associate Justice of the Supreme Court of the Territory of Arizona;

Now Therefore, if said appellant and principal herein shall prosecute its appeal to effect and if it fails to make its plea good shall answer and pay all costs herein, then this obligation to be void, otherwise to remain in full force and effect.

51 Witness our hands and seals this 13th day of March, 1905.

GILA BEND RESERVOIR AND IRRIGATION COMPANY,
By LEWIS WOLFLEY, *President.*

Attest: J. B. WOODWARD, *Secretary.*

Seal of the Gila Bend Reservoir and Irrigation Co.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By THOS. ARMSTRONG, JR., *Its Attorney in Fact.*
By E. GANZ, *Its Attorney in Fact.*

Seal of the United States Fidelity and Guaranty Company.

I, Richard E. Sloan, Associate Justice of the Supreme Court of the Territory of Arizona, hereby approve the within bond and the sufficiency of the surety thereto this 13th day of March, 1905.

RICHARD E. SLOAN,
Associate Justice of the Supreme Court of the Territory of Arizona.

Endorsed.—No. 827. In the Supreme Court of the Territory of Arizona. Gila Bend Reservoir and Irrigation Company *vs.* Gila Water Company. Bond on Appeal. Filed March 17, 1905, S. M. Cullom, Clerk.

Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit the 11th day of January, A. D., 1904, the same being one of the regular juridical days of the January Term, A. D., 1904, of said Court the following order *inter alia,* was had and entered of record in said court, in said cause, which said order is in words and figures, as follows, to-wit:

(Title of Cause.)

It is ordered that the Motion to Strike Abstract of Record from files, filed herein by Appellees, be submitted.

And afterwards and upon to-wit the 12th day of January, A. D., 1904, the same being one of the regular juridical days of the Janu-

ary Term, A. D., 1904, of said Court, the following order, *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

(Title of Cause.)

It is ordered that the Motion to Strike Abstract of Record from the files, filed herein by appellees, and heretofore submitted, be and the same is, hereby denied.

And afterwards and upon to-wit the same day the following
52 other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

(Title of Cause.)

On motion of J. B. Woodward, Esq., attorney for appellant herein, it is ordered that this cause be submitted on briefs.

And afterwards and upon to-wit the 26th day of March, A. D. 1904, the same being one of the regular juridical days of the January Term, A. D. 1904, of said Court, the following order, *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

(Title of Cause.)

This cause having been heretofore submitted and by the Court taken under consideration and the Court having considered the same and being fully advised in the premises: It is ordered that the judgment of the District Court be and the same is hereby affirmed.

It is further ordered, adjudged and decreed, that the Appellee herein, do have and recover of and from the Gila Bend Reservoir and Irrigation Company, a corporation, Appellant herein, its costs in this court, taxed at twenty-nine and 25-100 ($29.25) dollars, and its costs in the court below in this cause incurred.

And afterwards and upon to-wit the 6th day of May, A. D. 1904, the same being one of the regular juridical days of the January Term, A. D., 1904, of said Court, the following order, *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

(Title of Cause.)

At this day, on Motion of J. B. Woodward, Esq., it is ordered by the Court that the appearance of Bissell Thomas be entered herein as associate counsel for Appellant.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

(Title of Cause.)

In this cause, it is ordered that the Motion for Rehearing filed herein by Appellant, be and the same is hereby submitted.

53 And afterwards and upon to-wit the 7th day of May, A. D., 1904, the same being one of the regular juridical days of the January Term, A. D., 1904, of said Court, the following order, *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

(Title of Cause.)

In this cause it is ordered that the Motion for Rehearing, filed herein by Appellant, and heretofore submitted, be and the same is hereby denied.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

(Title of Cause.)

Comes now Bissell Thomas, Esq., attorney for Appellant herein, in open court, and gives notice of appeal from the judgment of this Court, to the Supreme Court of the United States, and moves the Court that the appeal be allowed.

It is ordered by the Court that said motion be granted and the appeal be and the same is hereby allowed.

And afterwards and upon to-wit the 9th day of January, A. D. 1905, the same being one of the regular juridical days of the January Term, A. D. 1905, of said Court the following order, *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

(Title of Cause.)

In this cause, it is ordered that the Motion for Remitt-tur filed by Appellees, be submitted.

And afterwards and upon to-wit the 11th day of January, A. D. 1905, the same being one of the regular juridical days of the January Term, A. D. 1905, of said Court the following order, *inter alia,*

was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

(Title of Cause.)

It is ordered that Appellee's Motion for Remittitur, filed herein, and heretofore submitted, be and the same is hereby denied.

54 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to The Gila Water Company, appellee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to an appeal, filed in the clerk's office of the supreme court of the Territory of Arizona wherein The Gila Bend Reservoir and Irrigation Company is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States this 25th day of March, in the year of our Lord one thousand nine hundred and five.

[Seal Supreme Court of Arizona.]

RICHARD E. SLOAN,
Associate Justice of the Supreme Court of the Territory of Arizona.

Witness the seal of said court.
S. M. CULLOM,
Clerk Supreme Court of Arizona,
By ANGIE B. PARKER, *Deputy.*

55 [Endorsed:] No. 827. In the Supreme Court of the United States. Gila Bend Reservoir and Irrigation Company, appellant, *vs.* Gila Water Company, appellee. Citation. Filed March 28, 1905. S. M. Cullom, clerk.

I hereby acknowledge the service of the within citation and the receipt of a copy thereof, this 28th day of March, 1905.

C. F. AINSWORTH,
President of the Gila Water Company, and Attorney for Fila Water Company, Appellee.

56 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Territory of Arizona, ss:*

I, Shelby M. Cullom, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing pages numbered from 1 to 53 inclusive, to be full, true and correct copies of the complaint, answer, amended answer of Gila Water Company, answer to cross complaint, minute entries of lower court of October 13, 24, 25 and November 8, 14 and 15, 1902, judgment, motion for new trial, bill of exceptions, assignment of errors, affidavit in lieu of bond, motion to strike abstract of record from files, suggestion of diminution of record, opinion, motion for re-hearing, affidavit of value, motion for remittitur, motion to deny remittitur, statement of facts in the nature of a special verdict, petition for appeal, allowance of appeal, bond on appeal, and all orders and proceedings of said court had and entered of record in the case of Gila Bend Reservoir and Irrigation Company appellant, against the Gila Water Company, appellee, as the same remain of record and on file in my office.

I further certify that the citation attached hereto is the original citation issued by said supreme court of the Territory of Arizona, in said above entitled cause.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Phœnix, Arizona, this 1st day of April, A. D., 1905.

[Seal Supreme Court of Arizona.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.

Endorsed on cover: File No. 19,708. Arizona Territory supreme court. Term No. 226. Gila Bend Reservoir and Irrigation Company, appellant, *vs.* The Gila Water Company. Filed April 13th, 1905. File No. 19,708.

FILE COPY.

Office Supreme Court U. S.
FILED
APR 9 1906
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October term, 1905.

No. 226.

GILA BEND RESERVOIR AND IRRIGATION COMPANY,
Appellant,

vs.

THE GILA WATER COMPANY.

BRIEF FOR APPELLANT.

Statement of the Case.

JOSEPH K. McCAMMON,
Attorney for Appellant.

WILLIAM C. PRENTISS.
Of Counsel.

Supreme Court of the United States.

October term, 1905.

No. 226.

GILA BEND RESERVOIR AND IRRIGATION COMPANY,
Appellant,

vs.

THE GILA WATER COMPANY.

BRIEF FOR APPELLANT.

Statement of the Case.

This was a suit filed by the appellant in the District Court of Maricopa County, Arizona, on June 25, 1902, to quiet its title to certain lands, dams, canals, water rights, rights of way, easements, and appurtenances, comprising an irrigation system situate in said county (R., 1-4).

All of the defendants except the appellee, the Gila Water Company, filed disclaimers (R., 5-6), thus reducing the controversy to one between the appellant and the appellee.

The appellee answered, denying the title of the complainant and setting up title in itself to the property in question, and averring that it and its grantors had been in peaceable and adverse possession of all the said property under title and color of title for more than three years preceding the commencement of the suit, and further that it and its grantors had been in peaceable and adverse possession of all the said property for more than five years prior to the commencement of the suit, using and enjoying the same and paying taxes thereon, claiming under deeds duly recorded, and by way of cross-complaint sought to have its own alleged title quieted as against the claim of the complainant (R., 6-7).

The appellant answered the cross-complaint, denying the appellee's alleged title and averring that the appellee pretended to claim title under an alleged decree of the said District Court of date November 20, 1894, and a certain pretended receiver's deed pursuant thereto, and through certain deeds of persons claiming to deraign title through said receiver's deed, but that the said decree and all proceedings thereunder were void because the court was without jurisdiction.

In response to the allegations of the cross-complaint of adverse possession in the appellee the appellant alleged that during all the time that the appellee claimed to have obtained title to the property the same was in the custody of the said District Court through its receiver in a certain other action pending therein, and that any and all muniments of title which the appellee may have received by tax deeds or otherwise were void (R., 8-9).

Upon these issues the case went to trial before the court without a jury, and a decree was entered dismissing the appellant's complaint and declaring the appellee to be the owner in fee of the property in question and quieting its

title (R., 13). Formal findings of fact and conclusions of law were filed and appear at pp. 35-37 of the record. The findings of fact need not be noticed for, though in form findings of fact, they are in reality merely conclusions of law that the appellee is the owner in fee of the property and that the appellant had shown no title at the time of the commencement of the suit.

At the trial the appellant reserved exceptions to the rulings of the court in admitting and excluding evidence, and also to the action of the court in dismissing the complaint and giving judgment for the appellee, and these exceptions and so much of the evidence as was deemed by the trial court sufficient for the purpose of such exceptions, appear in a bill of exception (R., 15-30).

Under the heading, Part II, Circumstances and Evidence (R., 18-30), the bill of exceptions presents an abstract of the evidence admitted or offered at the trial, from which it appears that the appellee deraigns its alleged title from the appellant through the proceedings in the suit mentioned in the appellant's answer to the cross-complaint (which will hereinafter be designated as Suit 1996) so that the controlling question in the case is the validity of the title so acquired.

The appellant, at the trial, introduced:

1st. The records of its title (R., 18).

2d. A tripartite agreement of June 16, 1893, between the appellant, the Arizona Construction Company, and the Peoria Canal Company (R., 19), from which it appears that the Arizona Construction Company, under contracts with the appellant, had constructed certain works and, differences and controversies having arisen and sales under certain deeds of trust given to secure the Arizona Construction Company having been enjoined at the suit of the appellant, it was agreed by way of settlement and adjustment that the injunction should

be dissolved, the sales proceed, and the title of the appellant's property be vested in the Peoria Canal Company by said company becoming the purchaser, that all of the stock of the Peoria Canal Company should be placed in escrow and become the property of the appellant upon full payment of notes of the Peoria Company, payable on or before two years, to be given the Arizona Company for the total amount of money invested by or owed by it, and that the Peoria Company should issue $750,000 first mortgage and $350,000 second mortgage bonds, the proceeds of which should be applied to the liquidation of the said notes. It was further provided that the cost of maintenance and repairs should be paid from the proceeds of the bonds or of sales of water rights (R., 19).

3d. A *lis pendens,* filed September 23, 1893, giving notice of a suit (which will hereinafter be referred to as No. 1728) filed in said District Court by the appellant against the Peoria Canal Company and the Arizona Construction Company seeking a decree declaring the appellant to be the equitable owner of the property in question, and specific performance of the tripartite agreement of June 16, 1893, and for general relief (R., 19-20).

4th. The application of the Peoria Canal Company, filed in said Suit No. 1728 on December 4, 1893, for the appointment of a receiver, setting forth that the said company was in possession of the property by virtue of the said tripartite agreement, and that by reason of damage by a flood and other circumstances a receiver was necessary to repair, operate and control the property. And an order in said cause appointing James McMillan receiver, with power *"to bring and defend suits,* to receive and collect rents, and especially to repair, rebuild, *and to save the property from all loss by reason of liens and judgments"* (R., 20).

At this point the appellant rested, upon the theory that its title was established, inasmuch as the Arizona Construc-

tion Company, the Peoria Canal Company, and McMillan, the receiver in Suit No. 1728, had disclaimed any interest in the property.

The appellee offered all of the evidence offered by the plaintiff, and, in addition, the complaint in Suit No. 1728, the answer therein of the Arizona Construction Company and the Peoria Canal Company, setting up *inter alia* that the amount payable to the Arizona Construction Company and to be represented by notes of the Peoria Canal Company under the tripartite agreement was $721,679.02 (R., 20-21), and the application for, and order appointing, the receiver *supra* (R., 21).

The defendant next introduced the complaint and exhibits, summons and answers in Suit No. 1996, W. H. Linn *et al vs.* the appellant and the Arizona Construction Company, the Peoria Canal Company and six individuals whose alleged interest does not appear in this record.

> It appears by the complaint in that suit, filed May 23, 1894, that the complainants therein were simple contract creditors of the Arizona Construction Company claiming to have advanced money to that company which was used in and about the construction of a certain dam and canal for the appellant, and that they charged that the tripartite agreement of June 16, 1893, was made without their consent and was in fraud of their rights, and that all of the parties to that agreement were insolvent. *The complaint further averred the appointment of the receiver in Suit No. 1728 and that such receiver had on or about December 7, 1893, taken possession of the property and was still in possession thereof,* and prayed that the court appoint a receiver or enlarge the powers of the "present receiver" and take possession of the property and sell it to pay the debts (R., 21).
>
> Summons thereon was returned May 25, 1894, served as to the appellant and *non est* as to the remaining defendants (R., 21).

The Arizona Construction Company and the Peoria Canal Company answered May 24 and 26, 1893, alleging that the tripartite agreement had been made in fraud of the rights of complainants and was impracticable and had not been carried out, and joining in the prayers of the complaint (R., 21-22).

The appellant and the defendant Burnett filed demurrers and general denials (R., 22). The defendant Wynd answered alleging that he was a stranger to the suit and setting up title under a sheriff's deed. The remaining defendants joined in the prayers of the complaint (R., 22).

The appellee next introduced the decree of *July* 21, 1894, in Suit No. 1996, which declared that *the Peoria Canal Company took the property as trustee under the tripartite agreement of June* 16, 1893, that said agreement had failed and was incapable of execution, that the complainants were creditors of the Arizona Construction Company prior to the execution of said agreement and had never assented thereto and that their claims were due and unpaid, and ordered that McMillan "the receiver heretofore appointed by this Court and now in possession of said premises under the orders of this Court" (in Suit No. 1728) proceed to advertise and sell said property, and distribute the proceeds as directed (R., 22). And the decree of *November* 20, 1894, in said Suit No. 1996, "which states that it is to be read and be *in lieu* of the decree of July 21, 1894," and followed the form thereof, with the addition of the defendants Crowley, Toohey, and Wynd [Wynd having no claim of title] to the class of creditors of the Arizona Construction Co. who had not assented to the tripartite agreement, and the addition of allowances to claimants who had filed claims subsequent to the former decree (R., 22-23).

The appellee then introduced the assignments of error in Suit No. 1996 from I to LXV, of which I, II and III al-

leged error in denying appellant's petition for change of venue and retaining jurisdiction after the filing of said petition and affidavits in support thereof, and LIII, error in admitting a certain sheriff's deed to the defendant Wynd over the objection that no title was claimed thereunder (R., 23-24); also motion for new trial made November 20, 1894, order denying the same, notice of appeal, and the further assignments of error LXVI to LXX, of which LXVII "alleges error in that no receiver had been appointed in said Suit No. 1996, nor had the powers of the receiver of Suit No. 1728 ever been enlarged to give the Court jurisdiction to so order the receiver of said Suit No. 1728 (R., 23-24). [By reference to the transcript of record in this Court in No. 199 October term, 1897, the full text of this assignment will be found and it will appear that the exception was directed to the portion of the decree ordering the appellant to make a certain payment as a condition of avoiding sale by the receiver.]

The appellee also introduced evidence that the May term 1894 of said District Court adjourned *sine die* December 5, 1894 (R., 23-24); a report dated January 3, 1895, bearing a double heading, viz: titles and numbers of suits 1728 and 1996, purporting to be of a sale of the property by McMillan, receiver, under orders and decree in Suit No. 1996, as amended November 20, 1894, to Crowley, one of the disclaiming defendants, and stating that over $100,000 of receiver's certificates were still outstanding; and an order of the said Court, (January 10, 1895) bearing a similar heading, confirming said sale upon condition that possession be not given until all the outstanding receiver's certificates should be paid off; and a deed of said property to Crowley purporting to be from McMillan, as receiver in said Suits Nos. 1728 and 1996, pursuant to orders and decrees in No. 1996, and deeds from Crowley to the

Valley Canal and Land Company and from said Company to the appellee (R., 24).

Also decree of February 18, 1899, in Suit No. 1728, *that the defendants go without day,* from which the appellant perfected an appeal to the Supreme Court of the Territory on April 16, 1899, which Court affirmed the decree below and handed down findings of fact in the nature of a special verdict, set out substantially in full in the record at pages 24-27, from which it appears that the Court in that case found *inter alia*:

> That the case (No. 1728) was tried and on January 5, 1894, submitted and taken under advisement; that the decree of November 20, 1894, in Suit No. 1996 was affirmed by the Territorial and United States Supreme Courts, whereupon McMillan, the receiver, proceeded to readvertise and sell the property; that on October 13, 1898, the appellant without leave of Court deposited in the clerk's office of the said District Court a Supplemental Complaint and, upon motion based thereon and without service on the receiver or defendants in said Cause No. 1728, the Court made an order directing the receiver to show cause why he should not be restrained from selling said property; that the receiver appeared and showed the decree in No. 1996 and, no evidence being offered, the motion to restrain was denied, and on November 23, 1898, the receiver sold the property to J. B. Greenhut (one of the disclaiming defendants herein); that the appellant moved the Court to restrain the receiver from conveying the property and, the motion not being based on any papers, affidavits, or other documents or facts, the receiver justified under the decree in 1996, as before, and the Court denied the motion, no evidence being offered except the records in the two Suits Nos. 1728 and 1996; that on February 4, 1899, the cause was set for final hearing, and on February 18, 1899, was heard and tried, no testimony

being offered or taken other than that taken and filed in November, 1893 (R., 25-26)."

As affecting the relief sought in that Suit (No. 1728), the Supreme Court of the Territory found that the appellant had not been injured nor damaged by any acts of the receiver or defendants therein and that all acts and doings of the receiver had been under orders and judgments of the District Court appointing him such receiver, that he was in possession and control of the property when ordered by the Court in Suit No. 1996 to sell the same, that the parties to Suit No. 1728 were parties to Suit No. 1996, in which all the rights of the appellant were at issue and as fully determined as they could have been in No. 1728, and that the appellant's Supplemental Complaint was not filed by leave of Court nor served on either of the defendants in No. 1728 (R., 27).

The appellee also introduced the report made in Suit No. 1996 by McMillan, as receiver, of sale of the property to Greenhut November 23, 1898, for $18,800, stating that Crowley, the former purchaser had failed to pay off the receiver's certificates and that the receiver had never given him possession, and reciting that the sale to Greenhut was made under the amended decree of November 20, 1894, and the order of January 10, 1895 (confirming the sale to Crowley); also the order in Suit No. 1996 confirming the sale to Greenhut, also deed from the receiver to Greenhut purporting to be by a receiver duly appointed in Suits Nos. 1728 and 1996, and reciting that the sale was made under orders and decrees in No. 1996; also deed from Greenhut to the appellee (R., 27).

The appellant duly excepted to the admission of the various proceedings in Suit No. 1996, and all of the deeds under which the appellee deraigned title, upon the grounds (Nos. 2, and 4, R., 15-16):

1st. That the complaint therein showed that it asked seizure of property in the hands of a receiver in a prior suit (No. 1728) who was not made a party thereto.

2d. The complaint, summons and answers tended to show collusion between the complainant and the defendants other than the appellant.

3d. That the decrees attempted to order the sale of property in the hands of the receiver in Suit No. 1728 who had not been made party to No. 1996, and that the two suits had never been consolidated.

4th. That the complaint prayed for sale of the property and not for judgment *in personam* against the appellant or any of the defendants.

5th. That the said decrees were for sale of the property and judgment *in personam* was not given against the appellant or any of the defendants.

W. C. Foster testified for the appellee that Greenhut had taken possession of the property upon receiving the receiver's deed and had placed a keeper in charge, and that the appellee took possession upon receiving the deed from Greenhut and was in possession when this suit was commenced (R., 27).

The appellee here rested and the appellant introduced the order of May 29, 1984, in Suit No. 1996, which purported to invest McMillan as receiver in No. 1728 with full possession and such title as to assure the purchasers of water rights a complete and perfect title to the same (R., 27).

Also appellant's motion for a new trial in Suit No. 1996 after the decree of July 21, 1894, and the order therein denying the same, and noting the appellant's appeal in open court (R., 28).

The following offers of further evidence were made by the appellant and, upon objection, rejected by the court (R., 28-29) and exception reserved (Nos. 5 to 17 R., 16-18):

The remainder of the record of Suit No. 1996 in the District and Territorial Supreme Courts which shows:

> The filing of an affidavit of bias and prejudice (Par. 14, R., 28).
>
> That the plaintiffs in No. 1996 were all stockholders and officers of the Arizona Construction Company, and that the stockholders of the Peoria Canal Company were the stockholders of the Arizona Construction Company.
>
> That the questions of jurisdiction over the *res*, loss of jurisdiction by reason of the perfecting of the appeal from the decree of July 21, 1894, and fraudulent collusion, were not presented in the briefs in the Territorial Supreme Court (Par. 16 R., 28).
>
> That no order was made by which the Court acquired control of the property and that no officer ever made any return showing that the property had been taken into the control or possession of the Court; that McMillan was never appointed receiver therein; and that the Court never acquired jurisdiction over the *res* (Par. 17, R., 28).
>
> That appellant perfected its appeal (Secs. 859-861, R. C. of Ariz. 1887) on November 12, 1894, by bond duly approved and filed (Par. 18, R., 28-29).

The records in Suits Nos. 1728 and 1996 in the Territorial Supreme Court showing that the order of January 10, 1895, in No. 1996, and the deeds from the alleged receiver to Crowley and Greenhut were not involved in those suits as appealed, and that said order has never been affirmed by any appellate court (Par. 20, R., 29).

And the record of Suit No. 1728 in the District and Territorial Supreme Courts showing, in further deraignment of its title:

> That the appellant filed a supplemental complaint therein, after first serving a copy thereof on the attorneys of record of the defendants, as evidenced by

indorsements thereon and thereby attempted to maintain its title and claim to the property (Par. 2, R., 29), and to have the receiver restrained from selling the same without authority in said suit (Par. 22, R., 29), and on November 23, 1898, applied to have the receiver restrained from conveying or giving possession pursuant to the sale to Greenhut until so ordered in that suit (Par. 23, R., 29).

That the appellant moved for a rehearing by the Territorial Supreme Court and that the same was denied in April, 1902 (Par. 24, R., 29).

That McMillan as receiver therein was never ordered or authorized by any order therein to sell or otherwise dispose of the property (Par. 25 [24] R., 29).

The District Court having entered its decree, dismissing the appellants complaint and quieting the title of the appellee under its cross-complaint, the appellant perfected its appeal to the Territorial Supreme Court.

Through inadvertance of the clerk, the transcript of record on appeal to this Court omitted the date of filing of the affidavit in lieu of bond on appeal to the Territorial Supreme Court. To supply this omission we have filed with the clerk a certificate of the clerk of the Court below supplying this omission and print the same herein, as follows:

IN THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No 3966.

In the District Court, Third Judicial District, Territory of Arizona, County of Maricopa.

GILA BEND RESERVOIR AND IRRI. CO., *Plaintiff*,

vs.

PEORIA CANAL COMPANY, *et al.*, *Defendants.*

Affidavit in lieu of bonds to pay costs of Appeal or give Security therefor. Section 1507 R. S. of A. 1901.

Filed February 27, 1903,
ELIAS F. DUNLEVY, *Clerk.*
By J. E. STURGES, *Deputy.*

SUPREME COURT, TERRITORY OF ARIZONA } *ss.*

I, Shelby M. Cullom, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify to the foregoing to be a full, true and correct copy of the endorsement on the Affidavit in lieu of Cost Bond on Appeal in case of Gila Bend Reservoir and Irrigation Company *vs.* Peoria Canal Company, *et al.*

In witness whereof, I have hereunto set my hand and affixed my seal of said Court this 29th day of August, A. D. 1905, at Phoenix, Arizona.

[SEAL.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.
By ANGIE B. PARKER, *Deputy.*

The assignment of errors on appeal to the Territorial Supreme Court (R., 31-33) are substantially reiterations of the exceptions reserved at the trial (R., 15-18).

The Territorial Supreme Court affirmed the decree of the District Court (Opinion R., 37-40) and filed a statement of facts in the nature of a special verdict (R., 45) adopting the bill of exceptions, including the statement of circumstances and evidence, and further finding as facts (R., 45):

"That no order was made in the District Court consolidating Suits Nos. 1728 and 1996."

"That the receiver appointed in No. 1728 made the sale and executed the deed under which the appellee claims title."

"That no order was in terms made extending the receivership in No. 1728 to No. 1996, the latter case being the one in which the receiver made said sale and by the judgment therein assumed to convey the title to said property."

"That the only orders made in No. 1996 relating to said receivership are those dated May 29, 1894, July 21, 1894, November 20, 1894, and January 10, 1895, referred to in the bill of exceptions."

The Territorial Supreme Court in its opinion, however, drew conclusions not warranted by the facts so found by it or the facts set forth in the bill of exceptions adopted by it.

In the opinion it is said (R., 39):

"In passing upon this objection the trial court pointed out that all the parties in Cause No. 1728 were parties in Cause No. 1996, that, when the latter suit was brought, the property was in the hands of the Court, through its receiver, and that after the bringing of Cause No. 1996 the record disclosed that the Court and all the parties, including the Gila Bend Reservoir and Irrigation Company, treated the property in possession of the receiver, appointed in Cause No. 1728, as though it had been placed in his possession as a receiver appointed in Cause No. 1996, and, further, that orders were made by the Court concerning said receivership which were entitled in both suits jointly, and held that, although no order was made consolidating the two suits and no order was in terms made extending the receivership to the second suit No. 1996, the receivership was in fact extended to the second suit, and that the Court, by its action ratified the acts of the receiver in the second suit, and thereby, in effect, extended his power and authority as such receiver to said second suit."

That the Court and all parties in Suit No. 1996 treated the property in the possession of the receiver as though it had been placed in his possession as a receiver appointed in No. 1996 is an assumption not warranted by the record, as shown by assignment LXVII, R., 24; and the only order entitled in both suits jointly was that of January 10, 1895 (confirming conditionally the sale to Crowley) entered after the appeal of the appellant in No. 1996 had been perfected (Par. 18 and 19, R., 28-29).

It is also stated in the opinion that the appellant applied for the appointment of a receiver in Suit No. 1728 which is also a manifest error, as the record shows that the receiver was appointed upon application of the Peoria Canal Company.

The Territorial Supreme Court held that the view taken by the trial court *supra*, was amply justified by an inspection of the record in Suits Nos. 1728 and 1996; that the failure of the trial court in No. 1996 to enter a formal order extending the receivership from No. 1728 to No. 1996 was a mere irregularity of practice which should have been taken advantage of during the pendency of the action; that it was within the power of the trial court to extend the receivership in No. 1728 to No. 1996; that, the trial court having jurisdiction of the property and the parties, the appellant had the right to object to the extension of the receivership so as to cover both cases without a formal order entered in that behalf; that the appellant could likewise have moved to set aside the judgment for that or any other irregularity, and if it did not take such action it must be held to have waived the error, and, if it took such action, the ruling of the court thereon, having been reviewed by the Territorial and United States Supreme Courts, can not now be reviewed; and that the judgment in No. 1996 was conclusive, and not subject to collateral attack by the appellant (Opinion, R., 39-40).

The appellant moved for a rehearing, pointing out the erroneous assumptions referred to and the errors of the Court in its conclusions of law (R., 40-42) and, the same being denied, prosecuted this appeal.

SPECIFICATIONS OF ERROR.

The errors of the Supreme Court of the Territory of Arizona, asserted by the appellant and intended to be urged are as follows:

1. The said Supreme Court erred in affirming the judgment of the District Court of the Third Judicial District of the Territory of Arizona, entered in this cause November 15, 1902, for that said District Court dismissed appellants complaint after appellant had proved an equitable interest in and to the property described in the complaint herein, and after all of the defendants had answered and disclaimed all right, title or interest in or to said property, except the Gila Water Company, and appellant had answered the cross-complaint of the Gila Water Company, and had set up the fact that the judgment under which said Gila Water Company would claim title, was and is absolutely void.

2. The said Supreme Court erred in refusing to sustain the exceptions taken by appellant to the errors of the said District Court in accepting and rejecting evidence as duly assigned to said Supreme Court for the reason that said exceptions were sanctioned by the law and the facts found in this case.

3. That said Supreme Court erred in affirming the judgment of the said District Court, for that the appellee claims title under a judgment rendered in Suit No. 1996, in said District Court. And said Suit No. 1996 was an action *in rem* against the property described, therein and the judg-

ment was for the sale of said property, and no judgment *in personam* was asked or given against the defendants or any of them, and that the Court in said Suit No. 1996 had never acquired or taken jurisdiction of the property therein asked to be sold, and therefore the judgment and all orders and decrees in said Suit No. 1996 were and are absolutely void.

4. That said Supreme Court erred in affirming the judgment of the said District Court, for that the appellee claims title under a judgment in Suit No. 1996, in said District Court and said judgment is void, in that there was collusion between the plaintiffs and defendants therein, in that plaintiffs were all stockholders in the Construction and Canal Companies; that the stockholders of said corporation were one and the same in each.

That all the other defendants were, by the title of the action, equally plaintiffs—that all answered without summons, and asked the same relief as plaintiffs, except Wynd and Burnett and they too were creditors of said Construction and Canal Corporations.

5. That said Supreme Court erred in affirming the judgment of the Court below in favor of appellee, for the reason that appellee asserts title to the property in dispute herein under the sale of the property made under the judgment in case No. 1996. Whereas the judgment in said case No. 1996 was and is void, the court having lost jurisdiction of said case, by reason of the fact that the appellant herein against whose property the judgment in said Case No. 1996 was rendered, had before the trial of said case, filed its motion for a change of venue in conformity with the laws of the Territory of Ar'zona, on account of the bias and prejudice of the trial judge, but which was unlawfully denied by the trial judge.

6. The said Supreme Court erred in affirming the judgment of the trial court, rendered in favor of the appellee

and quieting title to the property in dispute in appellee, for the reason that appellee claims title to said property herein, by virtue of a sale made under the judgment in Case No. 1996, wherein said judgment was and is void, in this that the judgment under which said sale was made was rendered and docketed in the trial court, after an appeal had been taken and perfected in said case to the Supreme Court of the Territory of Arizona, from a judgment theretofore rendered therein, and by reason of said appeal the trial court had lost jurisdiction of said case, to thereafter render any judgment therein.

7. That said Supreme Court erred in affirming the judgment of the said District Court, for that the facts show that the said judgment in said Suit No. 1996, under and through which said appellee claims title, was and is absolutely void, in that the said Suit No. 1996, was an action *in rem* and the said District Court had not taken or acquired jurisdiction over the *res,* that was the subject matter of said Suit No. 1996, and that the plaintiffs and defendants in said Suit No. 1996, were in collusion, except appellant herein, defendant therein; and that appellant herein, as defendant in said Suit No. 1996, filed an affidavit of "bias and prejudice" of the trial judge, and moved for a "change of venue" as provided for by the laws of Arizona; and that the judgment of said District Court in said Suit No. 1996, under and through which appellee claims title, was rendered therein, after appellant herein, as defendant therein, had perfected an appeal from said District Court, from a prior judgment therein, as provided for appeals by the laws of Arizona.

8. The said Supreme Court erred in affirming any decree against appellant for that all the defendants except the Gila Water Company, have answered disclaiming any right, title or interest in or to said property, and the record of

said Suit No. 1996, on its face shows that the judgment, under which defendant, the Gila Water Company claims title was and is absolutely void. The complaint in said suit prays for the sale of the property therein described, the judgment directs the sale of said property, and no judgment *in personam* was prayed for or decreed.

The complaint states, that said property is now in the hands of a receiver appointed by said Court in another action. The record shows that James McMillan, receiver, in Suit No. 1728 was said receiver. The judgment orders said James McMillan, receiver, *heretofore appointed,* and *now in possession of said property* to sell the same.

The record of said Suit No. 1996, shows that said James McMillan, receiver, aforesaid, was not made a party to said action No. 1996, nor were said Nos. 1996 and 1728 shown by said record to have ever been consolidated.

Nor was the *res,* the subject matter of the suit ever otherwise taken into the jurisdiction of the Court in said Suit No. 1996.

9. The said Supreme Court erred in affirming any decree against this appellant, for that all the defendants disclaimed all right, title and interest, except the Gila Water Company, and appellant in its answer, to said defendant, the Gila Water Company's cross-complaint, set up, that the judgment under which said defendant Gila Water Company would claim title, was absolutely void, and appellant was not allowed to introduce evidence to prove that said judgment was void.

10. The said Supreme Court erred in affirming the said judgment of the said District Court, for that the said Supreme Court found in affirming said judgment, that "in the year 1893 appellant brought suit against the Peoria Canal Company and the Arizona Construction Company, and applied for a receiver therein," and the said Court further

found therein that "all parties, including the Gila Bend Reservoir and Irrigation Company, treated the property in possession of the receiver, appointed in Cause No. 1728, as though it had been placed in his possession, as a receiver appointed in Cause No. 1996, and further that orders were made by the Court concerning said receivership, which were entitled to both suits jointly." "Whereas said findings are wholly unwarranted, and are directly contradicted by the plain facts in the case, and as stated in the "Findings of Fact" in the nature of a "special verdict" herein, and appellant's motion for a rehearing was denied.

11. The said Supreme Court erred in affirming the said judgment of the said District Court and in finding therein that the failure "to enter a formal order extending the receivership from Cause No. 1728 to Cause No. 1996, was not one which rendered the judgment complained of void upon its face, but was a mere irregularity of practice," for that the facts show that said Suit No. 1996 was an action *in rem* for the sale of the certain property therein described, and that the judgment was for the sale of said property, and that no judgment *in personam* was prayed for or given in said action. The facts further show that no order was made or given, by which the Court could or did acquire jurisdiction of the *res* in said Suit No. 1996, prior to the hearing and determining of said action.

12. That said Supreme Court erred in affirming said judgment of said District Court, for that said Supreme Court found that the action in said Suit No. 1996, "having been reviewed by this Court and the Supreme Court, can not now be reviewed in this suit, and the Judgment in Cause No. 1996, was conclusive and not subject to collateral attack by appellant." Whereas the evidence introduced and offered shows that said judgment and all the proceedings and orders under it, were and are absolutely void and therefore the proper subject of attack in a collateral proceeding.

13. The said Supreme Court erred in not reversing the judgment of said District Court and in not giving judgment in favor of appellant, as prayed for in the complaint herein, for that the evidence shows that appellant was and is the equitable owner of the property described in the complaint herein, and that the legal title was and still is, either in the Peoria Canal Company, as trustee, or that in taking possession thereof in said Suit No. 1728, the legal title as well as the actual control and possession of said property, were and still remain, in the said District Court, for that, no deed has been shown from said Peoria Canal Company, nor has any order ever been made in said Suit No. 1728, by which the said District Court in said suit ever dispossessed itself of said title, control and possession. Said Peoria Canal Company and said James McMillan, receiver, have each of them answered disclaiming all right, title or interest in or to the property, and therefore judgment should have been given appellant, as prayed for in the complaint herein.

ARGUMENT.

The proceedings and decrees in Suit No. 1996 and sales thereunder were, in the courts below, and are here assailed as void upon the grounds:

1st. That the court never acquired jurisdiction, because

a. Suit No. 1996 was a proceeding *in rem.*

b. The property sought to be reached was already in the custody of the Court in Suit No. 1728.

c. That the two suits were never consolidated.

d. That no order was made in either purporting to extend the receivership from No. 1728 to 1996.

e. That the Court in Suit No. 1996 never acquired custody or control of the *res.*

f. That the Court in 1996 had no power to order sale of the property by the receiver in No. 1728.

g. That the sale was never authorized or confirmed in Suit No. 1728.

2d. That the proceedings in No. 1996 were collusive and fraudulent because it appeared

a. That the plaintiffs were all stockholders of the Arizona Construction Company and Peoria Canal Company.

b. That the defendants other than the appellant were all stockholders or creditors of those companies.

c. That the summons therein was returned the day after the suit was filed *non est* as to all of the defendants other than the appellant, and that all of the defendants except Burnett voluntarily appeared and answered within a few days, and the attorneys for the plaintiff appeared for Burnett and demurred to their own bill.

d. That the answers of all of the defendants, except Burnett, had been prepared before the filing of the bill.

e. And that the suit was a fradulent scheme upon the part of all parties thereto, other than the appellant, to procure a sale of the property and prevent the appellant having the relief it was seeking in No. 1728, viz.: To have its obligations to the Arizona Construction Company liquidated and converted into notes maturing in two years, and thus enable it in the meantime to issue and float its bonds.

f. And that said scheme was concocted when it was discovered by the stockholders of the Arizona Construction Company, that, notwithstanding the tripartite agreement, the appellant had the power thus to raise money by bond issue and had sought an injunction restraining the Peoria Canal Company from issuing non-redeemable bonds.

3d. Because the jurisdiction of the Court had been terminated by the filing of an affidavit of bias and prejudice and motion for change of venue.

4th. Because the jurisdiction of the Court had been terminated *pro tempore* by the appellant's perfected appeal from the decree of July 21, 1894, before the entry of the decree of November 20, 1894, under which the sale purported to be made.

As recognized by the court below, the power of the Court in No. 1996 to decree the sale of property in the custody of the receiver in No. 1728 and the validity of the sale under the appellee claims, are the controlling questions and the argument will be directed mainly to them.

> "Where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision is correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. *But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but void.*"
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> Elliott vs. Peirsol, 1 Pet. 328,340.
>
> *Re* Sawyer, 124 U. S. 200, 220.

It is elementary that, if the trial court lack jurisdiction, affirmation by the appellate courts can not give validity to its judgment, for jurisdiction in the Appellate Court depends upon jurisdiction in the lower court.

This principle necessarily applies even to this Court as the ultimate tribunal. If it act in a case without jurisdiction its judgment is void and it has the power to so declare.

In *ex parte* Crenshaw, 15 Pet. 123, the court had taken cognizance of an appeal from a circuit court and reversed the judgment. After the term expired a motion was made to vacate the judgment upon the ground that citation had never issued. It was objected that the Court had lost control over its judgment by reason of the expiration of the term; but it was held that the judgment of reversal was absolutely void for want of jurisdiction.

And in Voorhees vs. Jackson, 10 Peters, 449, Mr. Justice Baldwin delivering the opinion said (p. 474):

> "The only difference in this respect between this and any other court is that no court can revise our proceedings, but that difference disappears, after the time pre-

scribed for a writ of error or appeal to revise those of an inferior court of the United States or of any State; they stand on the same footing in law. The errors of the court do not impair their validity; binding till reversed, any objection to their full effect must go to the authority under which they have been conducted. *If not warranted by the Constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done coram non judice;* that is, by persons assuming the judicial function in the given case without lawful authority.

"The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the case where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings, which are irreversible for error."

In Des Moines Nav. Co. vs. Iowa Homestead Co., 123 U. S., 552, 556, this court again recognized the principle and considered the question whether the point raised rendered the judgments in the case absolutely void. Mr. Chief Justice Waite said:

"We proceed, then, to consider the only objection which has been made to this defense, and that is, the alleged want of jurisdiction in the courts of the United States—both this Court and the Circuit Court—to entertain and finally dispose of the suit in which the prior adjudication was had.

"The precise question we have now to determine is whether the adjudication by this Court, under such circumstances, of the matters then and now at issue between the Homestead Company and the Navigation and Railroad Company was absolutely void for want of

jurisdiction. The point is not whether it was error in the Circuit Court to take jurisdiction of the suit, or of so much of it as related to the Navigation and Railroad Company, originally, but as to the binding effect of the decree of this Court so long as it remains in force, and is not judicially annulled, vacated or set aside.

"But here the question is whether, if all the parties were actually before the Circuit Court the decree of this Court on appeal is absolutely void if it appears on the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same state with the plaintiff."

In Mansfield, Coldwater & Lake Michigan Ry. Co. vs. Swan, 111, U. S. 379, 382, it was said:

"But the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this Court, of its own motion to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this Court, and then of the court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it."

The attention of the Court is now called to the lack of jurisdiction of the trial court in Suit No. 1996 and the consequent lack of jurisdiction in this Court, and is asked, as in *ex parte* Crenshaw, *supra*, to declare that a vital jurisdictional point was not considered, and that its judgment in that case and the judgments of the territorial courts therein were and are consequently void.

Suit No. 1996 was a proceeding in rem.

The complainants therein, residents of Illinois, were simple contract creditors of the Arizona Construction Company and claimed to have advanced money which was expended by that company in constructing the appellant's dam and canal in Arizona, and sought to have the property sold to pay their claims.

As no opinion was filed in Suit No. 1996 by the trial court, the Territorial Supreme Court, or this Court, the theory upon which the complaint was sustained does not appear, but in any event there was and could be no personal liability of the appellant to the complainants or other creditors of the Arizona Construction Company—in the absence of the tripartite agreement there was none, and by that agreement it assumed no personal liability of any kind—and no recovery *in personam* was sought in the suit and none was or could have been decreed.

In Pennoyer vs. Neff, 95 U. S., 714, Mr. Justice Field said:

It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they effect property in the State, they are substantially proceedings in rem in the broader sense which we have mentioned.

In Heidritter vs. Elizabeth Oil Cloth Company, 112 U. S. 294, Mr. Justice Matthews said, referring to a suit to enforce a mechanic's lien:

> "Indeed so far as the proceedings in question sought to bind the land by enforcing the plaintiff's claim as a specific lien thereon, and to dispose of the premises in

satisfaction thereof by a sale, *they were substantially in rem, whether there was personal or merely constructive service of process upon the defendant owner.* The kind of process and mode of service could be material only with reference to the nature of the judgment. He could be bound personally only by his coming or being brought personally within the jurisdiction of the Court. But the land might be bound, without actual service of process upon the owner, in cases where the only object of the proceedings was to enforce a claim against it specifically, of a nature to bind the title."

The circumstance that in Suit No. 1996 personal service was had upon the appellee and the remaining defendants voluntarily appeared could not affect the character of the proceedings, for

The proceedings in Suit No. 1996 being in rem, it was essential to jurisdiction in the District Court that the property be drawn into the hands of the Court in that suit by actual seizure or some action equivalent thereto.

In the Heidritter case Mr. Justice Matthews, continues:

"In such cases the land itself must be drawn within the jurisdiction of the Court, by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit.

In Cooper vs. Reynolds, 10 Wall., 308, Mr. Justice Miller gives the following admirable exposition of jurisdiction:

"It is necessary, therefore, in the present case to inquire, whether the errors alleged affect the jurisdiction of the Court.

"It is as easy to give a general and comprehensive definition of the word "jurisdiction" as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the Court over the parties, over the subject matter, over the *res* or property in contest, and to the authority of the Court to render the judgment or decree which it assumes to make.

"By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the soverign authority which organizes the Court, and is to be sought for in the general nature of its powers, or in authority specially conferred.

"Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.

"Jurisdiction of the *res* is obtained by a seizure under process of the Court, whereby it is held to abide such order as the Court may make concerning it. The power to render the decree or judgment which the Court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject matter of the cause."

See also Rose v. Himely 4 Cranch 268, 269.

Process upon the owner and parties interested does not create jurisdiction in such case, but is merely a step required by the constitutional guaranty of due process of law by way of giving opportunity to be heard.

In Windsor vs. McVeigh, 93 U. S., 279, Mr. Justice Field says:

"The seizure in a suit *in rem* only brings the property seized within the custody of the Court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be

> heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed, before the Court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of notification is immaterial, but the notification itself is indispensable.

See also Andrews v. Andrews 188 US 14

The suggestion in the Heidritter case that the mere filing of suit might be the equivalent of seizure can apply only where the property is in possession of the owner and there is no obstacle to the attaching of jurisdiction. Here—

The property being already in possession of the receiver in Suit No. 1728, it was a legal impossibility for the Court to acquire jurisdiction over it in an independent suit, to which the receiver was not made a party.

As said by the Chief Justice *in re* Tyler, 149, U. S. 164, 181:

> "No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the Court, for the benefit of the parties to the suit and all concerned, and can not be disturbed without the leave of the Court."

and by Mr. Justice Harlan in Thompson vs. Phœnix Ins. Co., 136 U. S. 287, 297:

"The title to property in the hands of a receiver is not in him, but in those for whose benefit he holds it. Nor in a legal sense is the property in his possession. It is in the possession of the Court, by him as its officer."

See also Hicks v Jenks 185 US ~~125~~ 155
Davis vs. Gray, 16 Wall. 203, 217-218.
Cohen vs. Solomon, 66 Fed., 411, 413.
Am. L. & T. Co. vs. Central Vt. R. Co., 86 Fed. 392.

This rule applies to suits in the same court.

In Guaranty Tr. Co. vs. Green Cove R. R. 139 U. S. 137, 146, Mr. Justice Brown said:

"For although the Court was in possession of the property proceeded against in the bill filed by Budington, Wilson & Co., to which the Trust and Safe Deposit Company was defendant, such receiver had been appointed upon the bill filed by Canova, to which the plaintiff was not made a party; and the order consolidating that cause with the suit by Budington, Wilson & Co., in which the plaintiff was named as a party, and in which it was attempted to obtain service by publication, was not made until February 6, 1885, two months after the expiration of the time within which the notice of publication required the plaintiff to answer, and after a decree *pro confesso* had been taken against it. The receivership could not have the effect of subjecting the property to the control of the Court in the particular bill filed by Budington, Wilson & Co., against the plaintiff, until the order of consolidation which, as before stated, was after the time limited for plaintiff's appearance, and after an order *pro confesso* had been entered against it."

In American Loan & Trust Co. vs. Central Vermont R. Co., 86 Fed., 390-392, it was said:

"The substance of the whole is that those who claim the disposition or possession of property in the hands of receivers of a court must come to that court, in that case, to reach it, and an independent suit for that purpose can not be maintained even in the same court. Leave of court to file a bill separately must be had in the original cause, and this annexes a new bill to that cause, and amounts to the same as filing it in that case would."

It being disclosed in the bill in No. 1996 that the property was in the hands of the receiver in No. 1728, such receiver was the only necessary party defendant and the bill should have been dismissed for want of proper parties.

In Express Co. vs. Railroad Co., 99 U. S. 191, 198, it was said:

"The bill avers that it was filed against the receiver appointed by the court below, that he was in possession of the railroad, and that the institution of the suit was by the consent of the Court. Without this latter fact the bill could not have been filed or maintained. The suit would have been a contempt of the Court which had appointed the receiver, and punishable as such.

"No party defendant was necessary but the receiver. He was in the possession of the property and effects of the Railroad Company, subject to the order of the Court and could have specifically performed the contract, or paid back the money loaned if the Court had so directed. The presence of the other parties was immaterial, and the bill might well have been dismissed as to them."

Here the two suits progressed independently, no order of consolidation was ever entered (Findings, R. 45), and in contemplation of law the property continued in the custody of the Court in No. 1728 and subject only to its orders therein.

The suggestion in the opinion of the court below

> "That the record disclosed that the Court and all the parties including the Gila Bend Reservoir and Irrigation Company, treated the property in possession of the receiver appointed in Cause No. 1728 as though it had been placed in his possession as a receiver appointed in Clause No. 1996" (R. 39),

is not supported by anything in the record, but, on the contrary, is in flat contradiction of the record facts found by the Territorial Supreme Court, viz.:

That no order was made consolidating the cases.

That the receiver in 1728 made the sale.

That no order was in terms made extending the receivership in No. 1728 to No. 1996.

That the receiver (in No. 1728) made the sale in No. 1996 and by the judgment rendered therein assumed to convey the title.

That the only orders made in No. 1996 relating to the receivership were those of

> May 29, 1894 (attempting to enlarge the powers of the receiver in No. 1728 so that "James McMillan as such receiver is hereby invested with full possession and such title as to assure the purchasers of such water rights a complete and perfect title to the same." Par. 12, R. 27-28).
>
> July 21, 1894 (decree directing McMillan "the receiver heretofore appointed by this Court and now in possession of said premises under the orders of this Court" to sell the property. Par. 6, R. 22).
>
> November 20, 1894 (the amended decree using the same language. Par. 7, R. 22).
>
> January 10, 1895 (after the appeal and not in the record which came to this Court. This confirmed the sale to Crowley reported by McMillan as having been made by him as receiver under orders and decree in No. 1996. Par. 9, R. 24).

> And November 23, 1898 (confirming sale to Greenhut for $18,800 reported by McMillan, as having been made that day under the amended decree of November 20, 1894, and the order of January 10, 1895, which had provided that possession be not given Crowley until he paid the outstanding receiver's certificates issued in No. 1728. This order of November 23, 1898, was entered after the affirmance by division of opinion in this Court).

The statement in the opinion below that orders were made concerning the receivership, entitled in both suits jointly (R. 39), is also controverted by the record. The only order jointly entitled was that of January 10, 1895, entered after No. 1728 had been submitted for decision (Jan. 5, 1894), and after final decree in No. 1996, and after the appeal which came here. Pennoyer v Neff supra

The Territorial Supreme Court in finding as a fact that no order was made consolidating Nos. 1728 and 1996 (R. 45) foreclosed any contention that this was an order consolidating the cases, but, in any event, jurisdiction to render the decree of November 20, 1894, if it existed, must be found in the record as it stood at that time.

The order of May 29, 1894, inasmuch as it attempts to direct a receiver in another and independent suit, was *coram non judice* equally with the attempted final decree.

The suggestion that, although no order was made consolidating the suits or extending the receivership to Suit No. 1996, the receivership was in fact extended to the second suit (Opinion R. 29) is a legal impossibility.

Suits can be consolidated only by a formal order.

In Merrill vs. Petty 83, U. S. 346, 347, it was said:

> "(1) That it was agreed between the parties that the two cases should be heard together, but the record contains no evidence of such an agreement, and if it did it could not avail the respondents, as it is settled

law that consent can not give jurisdiction. * * *

"(2) That the two cases were heard at the same time, before the District Court of the Eastern District, where this libel was pending. But that was a mere oral arrangement between the parties to expedite a decision, which neither did nor could have the effect to withdraw the other libel from the jurisdiction of the district court in which the suit was commenced. One was a proceeding *in rem* and the other was a suit *in personam,* and it does not appear that any attempt was made to consolidate them or to discontinue one and transfer it into the court where the other was pending. On the contrary, though they were both heard at the same time, it appears that separate decrees were entered, each in the respective district court where the suit was commenced. Separate appeals were also taken by the losing party in the district court where the decree was entered, and the two appeals were separately entered on the calendar of this Court.

"They were not heard together in the Circuit Court, as this suit was still before the commissioner, but the suggestion is that the merits in both suits were by consent discussed at the same time. Suppose that is so, still the fact remains that the respective decrees of affirmance were entered at different times and of course in the respective districts where the appeals from the respective district courts were pending. Nothing was done to consolidate the suits and separate appeals were allowed in this court."

No presumption will be allowed contrary to the facts stated in the record.

Settlemeier vs. Sullivan, 97 U. S. 449.
Galpin vs. Paige, 18 Wall. 366-7.
Thompson vs. Whitman, 18 Wall. 466.
Boswell vs. Otis, 9 How. 350.
Robinson vs. Fair, 128 U. S. 87.

Here Suit No. 1728 had been submitted on January 5, 1894 (Par. III, R. 25), and remained in such plight until

February 4, 1899, when it was again set for final disposition and decree was entered on February 18, 1899 (Par. V, R. 26).

No. 1996 proceeded independently to judgment July 21, 1894, and amended decree November 20, 1894 (Pars. 6, 7, R. 22), and the appeals therefrom pended until 1898, and sale to Greenhut was made in November, 1898.

The sine qua non of consolidation is that the two suits shall proceed as one.

The appeal in No. 1996 was from the decrees of July 21, 1894, and November 20, 1894, and presented the question of the right of simple contract creditors of the Arizona Construction Company to maintain such a suit against the property of the appellant, and, so confident were counsel of the lack of equity in the bill and of reversal by the appellate courts, that the fundamental question of jurisdiction, now urged, was overlooked.

Indeed, the attention of counsel was so centered upon that point and the question of change of venue that in the brief in this court it was even stated that the receiver had been appointed upon motion of the plaintiffs in suit No. 1996 (Bf. p. 54), and that the decree therein of Nov. 20, 1894, provided for the appointment of a receiver (Bf. p. 55). In Ward vs. Sherman 192 U. S. 168, 179, it was said that equity will not destroy rights on account of a mere technical mistake of counsel. Certainly inadvertence with respect to a vital jurisdictional matter should not be permitted to prejudice or estop.

After affirmance here by a divided court and the execution of the decree by a resale being attempted, attention was directed to the question of jurisdiction over the *res*, power in No. 1996 to sell property in the custody of the Court in No. 1728, and the anomaly of a receiver in one suit being, as such receiver, directed by a decree in a later and independent suit to make sale of the property in the custody of the Court in the first suit; and the appellant sought by

supplemental bill in Suit No. 1728 (which had been submitted January 5, 1894, and remained undecided) to present the question of lack of jurisdiction in Suit No. 1996 and obtain an injunction preventing the attempted sale, but was thrown out in the Territorial Supreme Court upon the technicality that its supplemental bill had not been served on the defendants nor leave of Court to file the same obtained (Par. V, R. 26, Par. X, R. 27), notwithstanding the record showed acknowledgement of service by the attorneys for defendants (Par. 21, R. 29) and that the Court had issued rules to show cause thereon.

In the meantime the sale and deed to Greenhut were made. As in the decree in No. 1996 (Pars. 6 and 7, R. 22), so in Suit No. 1728 the equitable title of the appellant under the tripartite agreement was recognized (Par VII, R. 26), but in No. 1728 it was found as fact that it had not been injured of damaged by any acts of the receiver in that suit or of the defendants (Par. IX) and the final judgment was that it take nothing for its action (Par. V, R. 26), the supplemental bill being ignored as not properly in the record; so that the result of that suit (No. 1728) was merely to deny specific performance of the tripartite agreement.

The appellee can not claim the benefit of a purchase at a sale made under color of judicial authority, but was put upon notice as to the authority of the receiver.

In a receiver's sale there must have been a suit in equity in which the receiver was duly appointed and such receiver must have been authorized in such suit to sell, and a sale so made must be confirmed by the court in the cause in which the receiver was appointed.

Koontz vs. Northern Bank, 83 U. S. 202.

In Shirver vs. Lynn, 2 How. 43, 60, the Court said:

> "The Chancellor is authorized to proceed in a summary mode, under the statute, for the sale of land, in the predicament of the above tract, after the decease of the devisee, without heirs. But he can only proceed on the application of persons interested. Here was no such application for the sale of this land. The sale being without authority, the ratification of it by the Court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. There was no case before the court—nothing on which its judgment could rest."

A receiver is not subject to orders passed in a case other than the one in which he was appointed

> Rinn vs. Astor Fire Ins. Co., 59 N. Y. 143-148.
> *In re* Mallery, 2 N. Y. Sup. 437, 438.
> Merritt vs. Sparling, 34 N. Y. Sup. 882, 885.
> Rogers vs. Corning, 44 Barb. 229, 231.

and confirmation of an unauthorized sale does not validate the sale.

> M. & M. R. R. Co. vs. Soutter, 2 Wall. 609.
> Bethel vs. Bethel, 6 Bush (Ky.), 65.

The decrees and sales in Suit No. 1996 being void for lack of jurisdiction, claim of title thereunder fails.

> Williamson vs. Berry, 8 How. 495, 542.
> Webster vs. Reid, 11 How. 437.

and other cases in this Court cited supra.

> Mulvey vs. Carpenter, 78 Ill. 580.
> Morris vs. Hogle, 37 Ill. 150.

Nor can the appellee rely on adverse possession. Section 2943, of R. S. of Arizona of 1901, provides:

> "Peaceable possession" within the meaning of this title is such as is continuous, and not interrupted by adverse suits to recover estate.

The appellant prosecuted Suit No. 1728 until denial of its motion for rehearing in the Territorial Supreme Court in April, 1902 (Par. 24, R. 29), after which it had two years to appeal to this Court. The present suit was commenced June 25, 1902.

Appellant having established an equitable title under the tripartite agreement and the trustee of the legal title, the Peoria Canal Company, having filed a disclaimer and the title of the appellee being shown to be void, the appellant was entitled to a decree quieting its title.

Section 4109, R. S., of Arizona, 1901, provides:

> "An action to determine and quiet title of real property may be brought by anyone having or claiming an interest therein, whether in or out of possession of the same against another who claims an estate or interest adverse to him."

This Statute is identical with Par. 3132, R. S. of Arizona of 1887, under which this Court has held that, in an action to quiet title, a party may plead a legal title and prove an equitable interest and be entitled to judgment.

> Ely vs. R. R. Co., 129 U. S., 292-3.
> See also Oliver vs. Dougherty, 68 Pac. 554.

The judgment of the Territorial Supreme Court should be reversed with direction to order a decree declaring and quieting the appellant's title.

Respectfully submitted,

JOSEPH K. McCAMMON,

Attorney for Appellant.

WILLIAM C. PRENTISS.

Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE GILA BEND RESERVOIR AND IRRIGATION COMPANY

vs.

THE GILA WATER COMPANY.

Appeal from the Supreme Court of the Territory of Arizona.

PETITION FOR REHEARING.

HUGH T. TAGGART,
Attorney for Appellant.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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Appeal from the Supreme Court of the Territory of Arizona.

PETITION FOR REHEARING.

Appellant prays the court for a rehearing in the above-entitled cause, and to rescind and vacate its judgment entered therein on May 14, 1906, and in support of his application respectfully submits the following considerations:

The record is somewhat involved and confusing, but it shows clearly that the court was misled in two important particulars as to the actual predicament of the facts upon which its judgment was invoked.

It is evident from the opinion—

1. That in the decision of the cause the court acted upon the assumption that the "findings of fact" by the court below were lacking in specific detail, and were mere generalities.

2. That, under this impression, it accepted as actual facts in the case certain material facts stated in the

opinion of the court below and approved the reasoning and the conclusion reached by that court based upon them.

As the matter appears to counsel the court below and this court acted upon mistaken premises in both instances.

I.

The Findings of Fact in the Court Below.

This court say in the opinion:

> "The findings of fact by the Supreme Court are *very general;* they are *only* that the appellant had not, at the commencement of the action, any cause of action in respect of the property and has not now any right, title, or interest therein; that the appellee was the owner in fee simple and in possession thereof."

These so-called "findings of fact" are obviously mere conclusions of law, and if the findings certified by the Supreme Court of the Territory contained nothing more, this court might well have been forced to look, as it did look, to the opinion of that court for the facts upon which such conclusions were based.

The certificate of the court below as to its findings of fact is, however, not thus meager, but is full and explicit, and, as will be presently shown, the statement of facts in its opinion, and upon which this court relied, is not supported by the statement of facts in its certificate, and is widely variant therefrom.

The record discloses (pp. 45, 46), that a statement or finding of facts was signed and certified by the Supreme Court of the Territory, and that the "Circumstances and Evidence, as certified and signed on the 24th day of November, 1902, of Edward Kent, the presiding judge, who tried this cause below," were made part of the statement or finding, "the same as if it were set forth at length"

therein. The "Circumstances and Evidence," so certified and signed by the trial judge and which thus became a part of the findings, will be found on pages 18 to 30 of the record. The formal findings conclude with the statement (Rec., p. 46), "that from the foregoing record and facts" the court finds against the appellant and in favor of the appellee.

There are no less than three findings of fact to be found in the transcript—one of them, the findings in a case other than the case at bar and introduced as evidence in the latter case (Rec., pp. 24–27); one of them, the findings of the Supreme Court of the Territory in the case at bar (Rec., 45, 46, and 18–30), and the remaining one, the findings of the trial judge in the case at bar (Rec., 35, 36). Inasmuch as the findings of the trial judge fully deserve the criticism of being very general, and as consisting of mere conclusions of law, while the findings of the Territorial Supreme Court do not, it is respectfully suggested that this court mistakenly assumed the findings of the former court to have been those of the latter, and in so doing reached a conclusion not justified by the record.

The object of the appeal was to have the question determined, whether the conclusions of the court below and its judgment were sustained by its statement or findings of fact, and in case of conflict betwen the facts as stated in its opinion and as given in its statement or finding, the latter must prevail.

> "The jurisdiction of the court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment."
>
> Harrison *vs.* Perea, 168 U. S., 323.
> Marshall *vs.* Burtis, 172 U. S., 635.

II.

The Facts Stated in the Opinion of the Court Below Are Variant From Those Stated in Its Formal Findings.

The judgment of this court is based wholly upon the statements of fact made in the opinion of the court below, and not upon the facts as given in the formal statement of its findings of fact signed and certified by the court below (Rec., 45, 46, and 18–30); the latter are not referred to in the opinion of this court.

By a contrast of the facts as given in the opinion of the court below with those set forth in its findings, it will be seen that the former are contradicted in material particulars by the latter.

The following facts are established by the formal findings, viz.:

Under date of June 16, 1893, three corporations, the Gila Bend Reservoir and Irrigation Company, appellant herein, the Arizona Construction Company, and the Peoria Canal Company entered into an agreement for the settlement "of all differences and controversies, and an adjustment of all contracts" existing between the Arizona Construction Company and the Gila Bend Reservoir and Irrigation Company (Rec., 19).

The litigation in the two cases No. 1728 and No. 1996, mentioned in the record, arose upon this agreement and had relation to certain lands and water rights belonging to the Gila Bend Reservoir and Irrigation Company, which were transferred by it to the Peoria Canal Company in accordance with and for the purposes mentioned in the agreement. The title of appellee, the Gila Water Company, is based upon decrees passed in No. 1996 for the sale of the property, and is dependent for its validity upon the jurisdiction of the trial court to pass such decrees.

The jurisdiction of the trial court is questioned by appellants seventh assignment of error, in which it is claimed that its judgment in case No. 1996 was, and is, absolutely void, in that the action was one *in rem* and that no act was done in the case No. 1996, by which jurisdiction over the *res* was acquired by the court.

In contrasting the facts set forth in its findings, with those stated in the opinion of the court below, with a view to showing that the latter are not supported by the findings, a brief reference to the agreement of June 16, 1893, and to the proceedings had in cases No. 1728 and No. 1996, as shown by the record, is necessary.

The Agreement of June 16, 1893.

The agreement provided for the dissolution of an injunction which had been obtained by the Gila Bend Reservoir and Irrigation Company against the Arizona Construction Company; that the latter company should pay off all contractor's liens; that title to the property of the Gila Bend Reservoir and Irrigation Company should be made perfect in the Peoria Canal Company; that the Canal Company should issue its promissory notes to the Construction Company, payable on or before two years, with interest for all moneys invested by the latter, with the interest thereon, the amount of the notes to be determined by verified statement of the treasurer of the Construction Company; that all the capital stock of the Canal Company should be deposited in escrow as security for the notes; that the Canal Company should issue $750,000 first and $350,000 second mortgage bonds; that all of the parties should aid in the sale of them; that the proceeds of the bonds should be used in paying off the notes, and if the notes were paid within two years from such proceeds, or by the Gila Bend Reservoir and Irrigation Company, the capital stock of the Peoria Canal Company should be delivered to the Gila Bend

Reservoir and Irrigation Company, and that the expense of maintenance and repairs should be paid from the proceeds of the bonds or from the sale of water rights (Rec., 19).

In compliance with the agreement the Gila Bend Reservoir and Irrigation Company turned over all its property, land, and water rights to the Peoria Canal Company, and the Canal Company took possession of it.

Case No. 1728.

After the lapse of upwards of three months from the date of the agreement, and on September 23, 1893, the Gila Bend Reservoir and Irrigation Company filed its complaint in the District Court of Maricopa County, against the Construction Company and the Canal Company, averring that it was the equitable owner of the property and that nothing had been done by the defendants to carry the agreement into effect, and praying that the Construction Company be required to forthwith make and deliver to the Canal Company the verified statement of its claims as provided in the agreement; that upon its receipt the Canal Company be required to issue its notes to the Construction Company, and to deposit its capital stock in escrow as required by the agreement; and that the Canal Company be restrained from issuing notes of any date prior to the receipt of such verified statement, and from doing any act or thing except as provided in the agreement (Rec., 19, par. 3, and Rec., 20, par. 5).

The Canal Company answered claiming to be "the legal and equitable owner in fee" of the property; stating the verified statement of the Construction Company had been made October 5 (subsequent to the filing of the complaint); admitting that its capital stock had not been placed in escrow; stating that as soon as the Construction

Company had paid its debts to subcontractors and others it would issue the notes under the agreement and that they would be dated June 19 (16?), 1893, etc. (Rec., 20, par. 5, foot of page).

Testimony was taken on both sides and closed on November 27, 1893 (Rec., 25, III).

On December 4, 1893, the defendant, Peoria Canal Company, applied for the appointment of a receiver "to repair, operate, and control the property" (Rec., 20, par. 4), and on December 6, 1893, on this application the court appointed James McMillan receiver of the property with power to bring and defend suits, to receive and collect rents, to repair and rebuild the property, and to save it from loss by reason of liens and judgments. Ibid.

The case was argued and submitted January 4 and 5, 1894 (Rec., 25, III). It was not decided until February 18, 1899, upwards of five years after it had been submitted, and was ripe for judgment (Rec., 24, par. 10).

From the decree passed February 18, 1894, which dismissed the bill with costs, an appeal was taken to the Supreme Court of the Territory by the complainant, the Gila Bend Reservoir and Irrigation Company, which was perfected April 11, 1899 (Rec., 24, par. 10).

In the findings of fact by the court below, in the case at bar, it is expressly stated that—

> "no order was in terms made extending the receivership in case No. 1728 to the case No. 1996, under the proceedings in which appellee claimed title, and that no order was made by the trial court consolidating the two cases" (Rec., 45, last two paragraphs).

The especial attention of the court is called to the fact that it is thus shown that the receiver was not appointed upon the application of the complainant (appellant herein), as assumed in the opinion of the court below,

and by this court by its adoption of that opinion, but upon the application of the defendant, the Peoria Canal Company, and to the further fact that the trial court did not exercise the power with which it was vested under sec. 921, R. S. U. S., by the passage of any order in the case which linked or connected it in any manner with the case No. 1996. Case No. 1728 was tried and submitted in the trial court as a suit, separate and distinct from any other, and certainly from case No. 1996, which had not then been instituted. The separate and distinct character of cases No. 1728 and No. 1996 is emphasized by the unsuccessful efforts made on November 2 and 23, 1898, in case No. 1728 by the complainant, the Gila Bend Reservoir and Irrigation Company, to have McMillan, the receiver appointed in No. 1728, restrained as such receiver from executing the decree in No. 1996, until he was so ordered by the court, in said case No. 1728 (Rec., 29, par. 22, last clause, and Rec., 29, par. 23, first clause).

Case No. 1996.

On May 23, 1894, nearly five months after case No. 1728 had been argued and submitted in the District Court, case No. 1996 was brought in that court.

Linn and others who claimed to be creditors at large of the Arizona Construction Company, for moneys advanced the latter and used by it in constructing a canal and dam for the Gila Bend Reservoir and Irrigation Company, were complainants; the Gila Bend Reservoir and Irrigation Company, the Arizona Construction Company, the Peoria Canal Company, and others, were defendants. The receiver in case No. 1728 was not made a party.

All of the complainants were stockholders and officers of the defendants, the Construction Company and the Canal Company (Rec., 28, par. 15).

The complainant averred that the agreement of June

16, 1893, was entered into without the consent of complainants and was in fraud of their rights and that the parties thereto were insolvent. It further averred that the court had on December 6, 1893, appointed a receiver who had taken possession of the property and that he "still holds possession of the same."

The bill prayed that the court appoint a receiver or enlarge the powers of the present receiver and take possession of the property and sell the same to pay proved debts (Rec., 21 and Rec., 25, IV).

None of the defendants were served with process except the appellant herein (Rec., 21).

The Arizona Construction Company answered on the day following that on which the bill was filed, and the Peoria Canal Company on the third day thereafter. The answers admit the averments of the complaint, and consent to the granting of the relief prayed (Rec., 21). The collusive character of the suit, as between the complainants and the defendants, other than the Gila Bend Reservoir and Irrigation Company, is shown by these answers and the answers of other defendants. Greenhut and Francis, two of the defendants, answered, stating that the acquisition of the property by the Peoria Canal Company was without their knowledge, and was in fraud of the rights of complainants. The record shows that Francis was a director in the Arizona Construction Company and the president of the Canal Company, and that as such he signed the agreement of July 16, 1893, under which the Canal Company acquired the property (Rec., 22, top of page). Burnett, another defendant, was represented by attorneys who were of counsel for complainants (Rec., 22).

The defendant, the Gila Bend Reservoir and Irrigation Company, moved for a change of venue and filed an affidavit of "bias and prejudice" which was overruled and exception taken (Rec., 23, par. 8; Rec., 32, par. 14). It

then filed a demurrer and general denial (Rec., 22, at marginal page 24).

On July 21, 1894, the court passed a decree in No. 1996 in favor of the complainants and therein directed—

> "that James McMillan, the receiver heretofore appointed by this court and now in possession of said premises under the orders of this court, proceed to advertise and sell said property and distribute the proceeds,"

as directed in the decree (Rec., 22, par. 6).

The defendant, the Gila Bend Reservoir and Irrigation Company, moved for a new trial; the motion was overruled; notice of appeal from the decree of July 21, 1894, was given in open court (Rec., 28). The appeal was perfected on November 12, 1894, and the transcript was filed January 9, 1895 (Rec., 29, top of page).

The trial court, notwithstanding the matter had thus passed from its jurisdiction, passed an amended decree on November 20, 1894, and thereby directed McMillan " the receiver heretofore appointed by this court, and now in possession of the property to advertise and sell the same and distribute the proceeds," as directed in the latter decree (Rec., p. 23). The defendent, the Gila Bend Reservoir and Irrigation Company moved for a new trial, under the latter decree, and the motion being overruled, appealed (Rec., 20, par. 7, 24; Rec., 25, IV). Case No. 1728 is not mentioned in either decree, by title or number.

It is expressly stated, in the findings of fact, by the court below, in the case at bar, "that no order was in terms made extending the receivership in case No. 1728 to case No. 1996, under the proceedings in which appellee claimed title and that no order was made by the trial court consolidating the two cases" (Rec., 45, last two paragraphs).

The especial attention of the court in this connection

is also called to the fact that the trial court in case No. 1996 did not, prior to the perfection of the appeals from the decrees therein, exercise the power with which it was vested under sec. 921, R. S. U. S., by the passage of any order in the case which linked or connected it in any manner with case No. 1728. Case No. 1996 was proceeded with in the trial court as a separate and distinct suit from case No. 1728, from its inception to the perfection, on November 12, 1894, of the appeal, by the defendant, the Gila Bend Reservoir and Irrigation Company, from the decree of July 21, 1894, and case No. 1728 had not been mentioned in it by number or title.

The receiver made a report of sale on January 3, 1895, of the property by him to Crowley, which he entitled in both causes No. 1728 and No. 1996; the *only order* of the trial court entitled in both cases was one passed on January 10, 1895, after the perfected appeal, confirming said sale (Rec., 24, par. 9). By that order appellant was not bound; the record fails to show any acquiescence in it, on his part, or in the decrees of July 21, 1894, or November 23, 1894; to the contrary the record shows that appellant moved for a new trial as to both decrees and that it appealed from both.

The property could only have been sold by the receiver at a sacrifice. The jurisdictional defects in the record, affecting his power to sell, were so obvious, as to preclude bids upon it from prudent persons, and to prevent fair competition.

Bearing in mind the fact that when the Arizona Construction Company first attempted to force a sale of the property, and was restrained, as recited in the agreement of June 16, 1893, it had created The Peoria Canal Company, to buy it in at the expected sale (Rec., 26, VII), and further bearing in mind the facts to which attention has been called, indicating that case No. 1996 was a

collusive suit, the inference is a fair one, that the Construction Company was the real purchaser of the property at the receiver's sale, and for a price less than it would have brought at a sale, the validity of which was not thus open to question.

Complainants in No. 1996 aver in their bill the fact that the property of which a sale was prayed was in the possession of a receiver appointed in another case and to the end that it might be brought within the jurisdiction of the court in their suit, pray the court to take possession of it by the appointment of a receiver therein or by an enlargement of the powers of the receiver in the other case.

The complainants in case No. 1996 knew that the receiver in the other case, and who as such had possession of the property, could not be sued as such in case No. 1996 without leave of the court. No such leave was obtained. Apparently the complainants proceeded upon the theory that the court in order to acquire the jurisdiction over the property which was essential to the scheme of the bill, would pass an order making the receiver in the other case a party, and would then either appoint some other person as receiver or appoint the same person as receiver in No. 1996 and enlarge his powers. In no other way could the *res* be lawfully seized.

The complainants took no steps to procure the passage of such order, and none was passed.

The rule is stated by this court in Express Co. *vs.* Railroad Co., 99 U. S., 191, 198, as follows:

> "The bill avers that it was filed against the receiver appointed by the court below, that he was in possession of the railroad, and that the institution of the suit was *by consent* of the court. Without this latter fact, the bill could not have been

> filed or maintained. The suit would have been a contempt of the court, which had appointed the receiver, and punishable as such."

See, also, American L. and T. Co. *vs.* Central Vermont R. Co., 86 Fed., 390, 392, where it is said:

> "The substance of the whole is that those who claim the disposition or possession of property, in the hands of receivers of a court, must come to that court, *in that case*, to reach it, and an independent suit for that purpose can not be maintained, *even in the same court*. Leave of court to file a bill separately must be had in the original cause, and this annexes a new bill to that cause, and amounts to the same thing as filing it in that cause."

If by reason of this oversight the court failed to acquire jurisdiction of the property and its orders for its sale were void, the fault is not appellants. It was not bound to procure such order. Mere acquiescence by it in the proceedings, or even an oral arrangement between it and the other parties in regard to them, could not confer jurisdiction. There was no consent, and even if there had been, jurisdiction could not have been acquired by it.

As to this, Merril *vs.* Petty, 83 U. S., 346, 347, cited in appellant's brief, (p. 33), is directly in point.

It was contended by counsel for appellant in the court below and in this court, in the brief and in the oral argument, that the case No. 1996 was a proceeding *in rem* strictly, and that by the failure to make McMillan the receiver appointed in the case No. 1728, and in whose possession as such receiver the property was, as stated in the bill, of which a sale was made, a party to the suit No. 1996, and by the failure to consolidate the two cases, they were left standing as separate, independent suits; and that, under the circumstances, the court, in 1996,

failed to acquire jurisdiction over the *res*, and that its order in that case directing the receiver in the other case to make a sale of the property was ultra vires and void.

This contention is well sustained by the authorities cited in the brief (pp. 27–29).

The court below sought to avoid the force and effect of appellant's contention by stating in its opinion that:

> "All the parties, including the Gila Bend Reservoir and Irrigation Company, treated the property in possession of the receiver appointed in cause number 1728, as though it had been placed in his possession as receiver appointed in cause number 1996; and, further, that orders were made by the court concerning the said receivership which were entitled in both suits jointly; and held that, although no order was made consolidating the two suits and no order was in terms made extending the receivership to the second suit, number 1996, the receivership was, in fact, extended to the second suit; and that the court by its action ratified the acts of the receiver in the second suit and thereby, in effect, extended his power and authority as such receiver to said second suit."

And it then held that:

> "The view thus taken was amply justified by an inspection of the records in the two suits, and upon this ground alone the action of the trial court in admitting the judgment was correct."

Distinguished from the mere matters of opinion in these assumptions of the court the matters of fact as above shown are controverted by the record and are unfounded.

Appellant did not treat the property in the possession of the receiver in case No. 1728 as though it had been placed in his possession as receiver appointed in case No. 1996; the record shows that throughout the proceedings the appellant was a resisting party and neither consented

to nor acquiesced in anything that was done in the case. The record shows not that "orders" were made by the court concerning the receivership which were entitled in both suits jointly, but that one such order only was made, and that this single order was made after the testimony in both suits had been closed, and the suits were pending in the appellate tribunal.

Whether in the absence of any order making the receiver in case No. 1728 a party to case No. 1996 and of any order of consolidation the receivership in case No. 1728 was, under the circumstances, extended to the second suit, No. 1996, is a question to be tested solely by the record and not by the impressions in the mind of the court below, and judged by this test there was no such extension; and whether the court by its action in passing the single order above mentioned, which is dated January 10, 1905, ratifying the sale made by the receiver, extended the power and authority of the receiver to the second suit, depends upon the state of the record antecedently; and this not only shows that the order of January 10, 1905, was passed after the decree for the sale and after the appeal in the case No. 1996 had been perfected and the transcript of the record delivered to the Supreme Court of the Territory (Rec., 29, par. 19), but that the court was otherwise without jurisdiction in the case.

The conclusion of the lower court that the assignments of error as to the absence of jurisdiction in the trial court in case No. 1996 was unfounded is, therefore, based upon erroneous premises; and it is respectfully submitted that the action of this court in adopting that conclusion and following the reasoning of the lower court is necessarily open to the same criticism.

In neither the opinion of the court below nor in that of this court are the facts upon which the judgment is

based deduced from the facts certified by the lower court. In the opinion of this court it is said:

> "It is clear from the record that the District Court *considered* the cases pending before it at the same time, *considered* 1996 as the complement of 1728, *regarded* the cases as in fact consolidated, *empowered* the receiver appointed in 1728 to sell the property and distribute the proceeds as directed by the decree in 1996."

The court below was without power to confer jurisdiction upon itself in this manner over the property; such jurisdiction could only be acquired in the regular method of procedure prescribed by law. This was not pursued.

To be entitled to any weight in determining the propriety of its decision, the considerations upon which the court below acted should be supported by the actual facts in the case.

It is respectfully submitted in conclusion that upon the showing above made the prayer for a rehearing in the case should be granted.

HUGH T. TAGGART,
Attorney for Appellant.

I hereby certify that I became of counsel for the appellant since the judgment of this court was rendered in the above-entitled case; that Mr. Prentiss, by whom appellant's brief was prepared and the oral argument in his behalf made, left the city of Washington before the announcement of the decision, and is traveling from place to place in the far west, and that I have not been able to communicate with him, and that in presenting the

above petition I am merely performing a friendly office in his behalf.

I have examined the transcript of the record and have read the opinion of this court in the case, and, to the best of my knowledge and belief, the facts set out in the foregoing petition appear of record herein, and that this petition is filed in good faith, and is not presented for the purpose of delay.

HUGH T. TAGGART.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 14 1906
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October Term 1905.

No. 226.

GILA BEND RESERVOIR AND IRRIGATION COMPANY,
Appellant,

vs.

GILA WATER COMPANY,
Appellee.

APPELLEE'S BRIEF.

C. F. AINSWORTH,
Attorney for Appellee.

Supreme Court of the United States.

October Term 1905.

No. 226.

GILA BEND RESERVOIR AND IRRIGATION COMPANY,
Appellant,
vs.
GILA WATER COMPANY,
Appellee.

APPELLEE'S BRIEF.

STATEMENT OF CASE.

This action was brought by the appellant alleging that it was the owner in fee simple of the property described in the complaint, and that the appellee and others therein named and made parties to said action, had no right, title or interest in said property or any part thereof, and demanded judgment that the title to said property be quieted in appellant. All of the defendants in the trial court, except the Gila Water Company filed disclaimers and judgment was rendered by the court in their favor, on the same.

The Gila Water Company by its amended answer denied that the appellant had any right, title or interest whatever in the property mentioned in its complaint, and by way of cross-complaint alleged that it was in the possession of the property and was the owner in fee simple of the same, and demanded judgment that it be adjudged to be the owner in fee simple of the said property and that the title thereto be quieted in the Gila Water Company,

and that the appellant be forever barred and estopped from hereafter claiming any right, title or interest in the said property or any part thereof.

Appellant filed a reply to the said cross-complaint of the Gila Water Company denying its title to said property, and upon the issues so formed, the action was tried by the trial court and judgment rendered in favor of the appellee herein, the Gila Water Company, dismissing the appellant's action and decreeing the appellee herein, the Gila Water Company, to be the owner in fee simple and in posession of all the property described in appellant's complaint and perpetually enjoined the appellant herein, the Gila Bend Reservoir and Irrigation Company, from ever asserting any right, title or interest to the same, adverse to the right, title interest of the Gila Water Company (Transcript Record, folios 14, 15).

From this judgment the Gila Bend Reservoir and Irrigation Co. appealed to the Supreme Court of Arizona where that Court affirmed the judgment of the trial court in the following opinion and judgment:

> "Upon the trial the Gila Water Company introduced in evidence to sustain its claim of title to the property in controversy, the record and judgment in a suit in which one W. H. Linn and others were plaintiff's and the Gila Bend Reservoir and Irrigation Co., and others were defendants, and known on the docket of the District Court of Maricopa County, where the suit was brought, as case number 1996.
>
> "The plaintiff, the Gila Bend Reservoir and Irrigation Company objected to the introduction of this judgment and record upon the ground of certain irregularities appearing upon the face of the record which it claimed rendered the judgment open to attack in this proceeding. The rulings of the trial court, in admitting this record and judgment, constitute the essential grievance of the appellant.

"It appears that in the District Court of Maricopa County, in the year 1893, the appellant brought suit against the Peoria Canal Company and the Arizona Construction Company and applied for a receiver therein to take possession of the property in controversy in this action. Thereafter the Court appointed one James McMillan as such receiver who took possession of the property and, by leave of the Court, issued a large amount of receiver's certificates to meet the expenses of necessary improvements upon the property. This suit was docketed as number 1728. Pending this action, one W. H. Linn, and others brought suit in the District Court of Maricopa County, against the appellant and other defendants, alleging in their complaint, among other facts, the pendency of action number 1728, the appointment of the receiver and the issuing of the receiver's certificates, and praying among other things that the assets of the Gila Bend Reservoir and Irrigation Company be marshalled and that the receiver take possession of and be directed to sell the property of the said company and from the proceeds of said sale pay the debts adjudged due against it.

"All the parties to this suit including the Gila Bend Reservoir and Irrigation Company, appeared and aswered. A trial was had and judgment was rendered in which the receiver was directed to sell the property. The record further discloses that a sale was made under this judgment by the receiver, which was affirmed by the court, and a deed executed by the said receiver to the purchaser, who was one of the grantors of the appellee. This judgment was appealed from to this court where it was affirmed, and subsequently an appeal was taken by the appellant to the Supreme Court of the United States where the judgment of this court was affirmed. The latter suit in the court below was docketed as number 1996. The objection which the appellant urged in the court below to the judgment in cause number 1996 was that it appears upon the face of the record that the judgment, ordering a sale of the premises by the receiver, was without jurisdic-

tion and void for the reason that no order was made by the court extending the receivership in suit number 1728 to cause number 1996. In passing upon this objection the trial court pointed out that all the parties in cause number 1728 were parties in cause number 1996, that, when the latter suit was brought, the property was in the hands of the court, through its receiver, and that after the bringing of cause number 1996, the record disclosed that the court and all the parties, including the Gila Bend Reservoir and Irrigation Company, treated the property in posession of the receiver, appointed in cause number 1728, as though it had been placed in his possession as a receiver appointed in cause number 1996, and, further that orders were made by the court concerning said receivership which were entitled in both suits jointly, and held that, although no order was made consolidating the two suits and no order was in terms, made extending the receivership to second suit, number 1996, the receivership was in fact extended to the second suit, and that the court by its action, ratified the acts of the receiver in the second suit and thereby, in effect, extended his power and authority as such receiver to said second suit.

"The view thus taken is amply justified by an inspection of the record in the two suits, and upon this ground alone the action of the trial court, in admitting the judgment, was correct.

"The trial court did not err for another reason. The failure of the court, in case number 1996, to enter a formal order extending the receivership from cause number 1728 to cause number 1996, was not one which rendered the judgment complained of void upon its face but was a mere irregularity of practice which should have been taken advantage of during the pendency of the action.

"As said by Mr. Justice Miller in Cooper vs. Reynolds, 10 Wallace, 308: "It is of no avail to show that there are errors in the record, unless they be such as to prove that the court has no jurisdiction in the

case, or that the judgment rendered was beyond its powers. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law.

"In Cornett vs. Williams, 20 Wallace, 226, we find this expression of the Supreme Court: 'The settled rule of law is that jurisdiction having attached to the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached by fraud.'

"It was within the power of the court to have extended the receivership in cause number 1728 to cause number 1996. It having jurisdiction of the property and the parties, the appellant had a right to object to the extension of the receivership so as to cover both cases without a formal order made and entered in that behalf. It could likewise have moved to set aside the judgment for this or any other irregularity that affected it. If it did not take any such action it must be held to have waived the error. If it took any such action, the ruling of the court thereon, having been reviewed by this court and the Supreme Court, can not now be reviewed in this suit, and the judgment in cause number 1996, was conclusive and not subject to collateral attack by appellant.

"The judgment is affirmed."

(Transcript of Record, pages 38 to 40 inclusive) and from the judgment of the Supreme Court of Arizona the appellant appeals to this court.

A statement of facts in the nature of a special verdict, was made by the Supreme Court of Arizona (Transcript of Record, pages 45, 46). The principal finding after stating the record is as follows:

"That from the foregoing record and facts, the court finds that plaintiff and appellant herein, Gila Bend Reservoir and Irrigation Company, a corpora-

> tion, has not and did not have at the commencement of this action any cause of action in respect to, nor did it have and has not now any right, title or interest in and to the property or any part thereof mentioned and described in the complaint herein; that the defendant-appellee, Gila Water Company, a corporation, was at the time of the commencement of this action and is now owner in fee simple and in possesion of all the property mentioned and described in plaintiff's complaint herein."

The evidence introduced by the appellee in the trial court traces the title to the property in question from the United States Government down to the appellee. This evidence is composed of record evidence read into the record and taken down by the court reporter, and exhibits filed therein, none of which appears to be set out in the bill of exceptions or in the transcript of record, and the reporter's notes were not transcribed and filed so as to make them a part of the record.

The appellant in this action is attempting to raise the question as to the validity of the judgment rendered against it in a former suit, in which it and other parties, and under which judgment the property in question was sold and by mesne conveyances passed to the appellee. The only contention on the part of the appellant herein is the invalidity of the former judgment of this court, through which the appellee deraigns title to the property in question

The history of the litigation in the suit referred to is substantially as follows:

The appellant, the Gila Bend Reservoir and Irrigation Company, brought suit against the Peoria Canal Company, and the Arizona Construction Company, known as suit No. 1728, in which suit the court took possession of the property mentioned in the complaint herein and appointed a receiver to take charge thereof, one James McMillan. In

this suit the receiver was ordered by the court to issue receiver's certificates to improve the property. The receiver issued receiver's certificates to the amount of $120,000.00 and while this suit was pending and before any judgment thereon was rendered, another bill in equity was filed in the same court, known as case No. 1996, in which W. H. Linn and others were plaintiffs and the Gila Bend Reservoir and Irrigation Company and others were defendants, making all the parties to the former suit parties to the second suit together with additional parties that were interested in the property. In this bill it was alleged among other things, the pendency of the other action, the appointment of the receiver, the issuing of the receiver's certificates and that the court had taken possession of the property and was managing and operating it through its receiver, and among other things prayed the court to marshal the assets and liabilities of the said corporation and to cause the said receiver to take possession of the said assets, and to ascertain the debts existing against the property of the said corporation for the construction, maintenance and operation of the same and also the order of priority of such indebtedness and that judgment be rendered establishing such priority, and that the receiver be directed to sell the property and out of the proceeds to pay the debts so adjudged due against the said corporation, in the order of their priorities. All the parties to that action appeared and answered. Judgment was rendered thereon in accordance with the prayer of the complaint and the receiver directed to sell the property. From the amended judgment entered therein appellant herein appealed to the Supreme Court of Arizona, where the judgment was affirmed and from that court appealed to this court where the judgment of the Supreme Court of Arizona was affirmed. (171 U. S. 685, Gila Bend Reservoir and Irrigation Company vs. Linn.)

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Thereupon in pursuance to the judgment the receiver sold the property in question, the sale was confirmed by the court and a deed executed by the receiver to the grantors of this appellee the Gila Water Company.

After the second suit was brought, the court through all the proceedings treated the actions as consolidated and all orders were made with the title of both suits. After the suit 1996 was determined by this court the appellant herein resurrected the suit No. 1728 in the District Court, whereupon the court rendered judgment against the appellant and in favor of the defendants, therein dismissing appellant's action and for costs. From this judgment appellant appealed to the Supreme Court of Arizona and the Supreme Court of Arizona affirmed the judgment of the court below, and upon request of the plaintiff and appellant herein for a statement of facts in the nature of a special verdict, the statement was made and filed among which is the following:

> "The plaintiff has not been injured or damaged by any acts of receiver James McMillan or defendants.
>
> "All acts and doings of receiver James McMillan have been under orders and judgments of the court apointing him as such receiver and that said receiver was in possession and full control of all the property involved in this action when ordered by the court in said suit No. 1996 to sell the same, and all the parties hereto were parties to said suit No. 1996, in which all the rights of plaintiff in said property were at issue and as fully determined as they could have been in this action." (T. R., p. 27).

The appellee, the Gila Water Company, denies that it deraigns its title to the property in dispute here, through the plaintiff and denies that at any time the plaintiff had any right or title to the property described in the complaint.

The only property ever owned by the plaintiff was the quarter section of land set out in the complaint (Folio 1, T. R.,) and some water appropriations and this was conveyed by the appellant to the Peoria Canal Company, June 16, 1893, (T. R., Folio 20).

The principal error complained of in the court below, by appellant was the admission by the trial court in evidence of the judgment and record in case No. 1996, (T. R., Folio 41) and we assume that will be the error assigned in this court, not having seen appellant's brief.

Before entering on the argument of the questions of law involved in this appeal, we desire to call attention to the record as presented to this court.

1st. To the statement of facts as found on pages 45, 46, Transcript of Record and move the court to strike out and disregard all that portion thereof reading as follows:

> "That this Supreme Court adopts and makes a part of this statement of facts the Bill of Exceptions in this case, Part I, Exceptions; Part II, Circumstances and Evidence, as certified and signed on the 24th day of November, 1902, by Hon. Edward Kent, the Presiding Judge who tried this cause below, the same as if it were set forth at length herein:"
>
> "That no order was made in the court below consolidating the case known as No. 1728 in the trial court and the case known as No. 1996 in the same court, said cases being those the record of which is referred to in the above mentioned Bill of Exceptions."
>
> "That the receiver appointed in said case No. 1728 made the sale and executed the deed under which the Gila Water Company, appellee, claims title to the property in dispute; that no order was in terms made extending the receivership in said case No. 1728 to said case No. 1996, the latter case being the one in which said receiver made said sale and by the judgment

rendered therein assumed to convey the title to said property; that the only orders made in said case No. 1996 relating to said receivership are those dated May 29, 1894, November 23, 1898, July 21 1894, November 20, 1894 and January 10, 1895, referred to in said Bill of Exceptions."

For the reason that these portions of the record do not comply with Sub. 3, Rule 8, of this court in this, it is incomplete in itself and refers to other papers, exhibits, and proceedings.

2d. To the Bill of Exceptions on pages 15 to 30 inclusive of the Transcript of Record and move to strike out the same, for the reason that this part of the record is incomplete, in not containing in itself, but only by reference the papers, exhibits, depositions, evidence, and other proceedings which are necessary to the hearing in this court, and is in direct violation of Sub. 3, Rule 8, of this court.

ARGUMENT.

(b) The argument of the questions involved on this appeal may for the purpose of succinctness and clearness be divided into four subdivisions or heads:

1st. The scope of the review of the judgment of the Supreme Court of Arizona.

2d. The right of the appellant to attack the judgment of this court in a former suit, to which it was a party and through which judgment defendant and appellee deraigns its title.

3d. The validity of that judgment and its binding effect on the court below and this court.

4th. The appellant not having established any title to the property, can not as against the appellee in possession question the title of the appellee.

FIRST.

The Supreme Court of Arizona having made a statement of facts in which it finds, that the appellant has not and did not have at the time of the commencement of this action, any cause of action in respect to nor did it have and has not now any right, title or interest in and to the property, or any part thereof, mentioned and described in the complaint herein; and that the appellee was at the time of the commencement of this action and is now the owner in fee simple and in possession of all the property mentioned and described in plaintiff's complaint herein, we contend that these finding are conclusive in this court as to the questions here presented.

This court has repeatedly held that on appeals from the Supreme Court of the Territories to this court that the facts set forth in the statement of facts which comes up on an appeal are conclusive in this court.

Hight vs. Boughton, 105 U. S. 235 on 236.
Harrison vs. Peria, 168 U. S. 311 on 323 and cases there cited.

We therefore submit that on the facts thus found by the Supreme Court of Arizona the judgment of the court below should be affirmed.

SECOND.

THE APPELLANT CAN NOT ATTACK THE VALIDITY OF THE JUDGMENT OF THIS COURT IN A FORMER SUIT, THROUGH WHICH JUDGMENT APPELLEE DERAIGNS ITS TITLE.

Our contention is that an attack upon the judgment rendered by the District Court and afterwards on appeal af-

firmed by this court, in case No. 1996, in the court below, is a collateral attack, and that such judgment can not be so attacked, but that it is binding upon the court below and that it could not have refused to give full credit, and that being true, the title of this appellee coming as it does through that judgment, must be affirmed and quieted in it.

Van Fleet on Collateral Attack, at Section 3 has this to say upon this point:

> "When a judicial order, judgment or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack. Familiar instances are where a person relies on a judgment to show his right or title in a suit to quiet title. That the objection to the judgment for judicial errors in such cases is a collateral attack, the cases all agree, hence citations are useless."

It is a well settled rule that the final judgments of a court can not be attacked in a collateral proceeding, but that if it is in any way erroneous, the same must be rectified in a direct proceeding for that purpose.

In his work on Collateral Attack, Judge Van Fleet, on page 29 thereof, lays down the following rule:

> "Jurisdiction existing any order or judgment is conclusive in respect to its own validity in a dispute concerning any right or title derived through it, or anything done by virtue of its authority."

This rule is borne out by the decisions in the following cases, to which we respectfully call the attention of the court:

> Cornett vs. Williams, 20 Wallace 226.
> Black on Judgments, 1st Ed. Sec. 245.
> Harris vs. Lester, 80 Ill. 307.

McGoon vs. Scales, 9 Wall. 23.
Wood vs. Bayard, 63 Pa. St. 320.
Gunn vs. Plant, 94 U. S. 664.
Hendrick vs. Whittemore, 105 Mass. 23.
Lee vs. Kingsbury, 62 Am. Dec. 546 (Tex.)
Yoeman vs. Younger, 83 Mo. 424.

From the above authorities it follows that the judgment through which the appellee deraigns its title to the property in question is conclusive upon the court below and also upon this court, unless the court rendering the judgment had no jurisdiction of the subject matter of the action, or the persons of the parties, and unless such lack of jurisdiction is shown that judgment is final and conclusive and it can not be disturbed in any way in a collateral proceeding, but must stand, and full credit as to its validity extended to it.

The court below in the action in which the judgment now under discussion (Linn et al vs. Gila Bend R. &. I. Co. No. 1996) was rendered decided that it had jurisdiction of the parties and subject matter, see folio 250, page 208, case 198, Supreme Court of the U. S., Oct. Term 1897, which is as follows:

(Title omitted).

"This cause having been tried by the court upon the complaint and separate answers of the several defendants herein and the court having made and entered its decree herein on the 21st day of July, A. D. 1894, and the defendants herein C. E. Crowley and Redmond Toohey, by C. F. Ainsworth, their attorney, having moved the court to amend said decree rendered herein, as aforesaid, and due notice having been given to all parties interested in said decree, and the court being fully and sufficiently advised in the premises, and all the parties to this action having appeared in court, either in person or by attorney.

"NOW THEREFORE, it is by the court considered, ordered and adjudged that the said decree made herein on the 21st day of July, A. D. 1894, be and the same is hereby amended so as to read and be in lieu of the original decree as follows, to-wit:

"It satisfactorily appearing to the court that each and all of the defendants herein have appeared and answered the complaint of the plaintiffs herein, and that the court has jurisdiction of the parties to this action and of the subject matter of this suit, and the court being satisfied by the evidence offered and admitted, etc., etc., etc. * * * IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the court that James McMillan, the receiver heretofore appointed by this court, and now in possession of said premises, under the orders of this court, proceed to advertise the premises and property described in the petition hereinbefore referred to and now more particularly described as follows, to wit:"

(Then follows a description of substantially all the property involved in this suit).

That decision was affirmed by this court, so that the court below can not when the same question is raised again, interfere with either its own decision in the former case or with the affirmance thereof by this court. It is bound by the adjudication of that fact by this court, and it can not now sit in judgment upon the same question for the purpose of in any way interfering with that judgment.

In Clary vs. Hoagland, 6 Cal. 685, the court in its opinion said in part, on page 688:

"It is well settled that when a case has once been taken to an appellate court, its judgment obtained on points of law involved, such judgment, however erroneous, becomes the law of the case, and can not on a second appeal be altered or changed."

In other words it can not be attacked or questioned for the purpose of interfering with it in any way, even in the same action. If this is so in the same action, how much more so must it be if the attack on the judgment is made in an entirely collateral proceeding? We contend that the court having decided that it had jurisdiction, such decision becomes *stare decisis* and can not be questioned by this court, not only upon that ground, but also upon the ground that the court below was bound by the decision of this court on that very question raised in the case in which the judgment was rendered.

In his work on Collateral Attack, Judge Van Fleet, at page 3, lays down the following doctrine, that:

> "Where a court has erroneously held that certain things are sufficient to give jurisdiction, and titles have been built thereon, the doctrine of *stare decisis* forbids the overruling of those decisions."

It is therefore submitted that in view of the decision of the District Court in the case of No. 1996 that it had jurisdiction over the parties and subject matter, and the affirmance thereof by this court, that judgment was conclusive and final and binding upon the court below in this action, and it was the duty of the court below to give full credit to that judgment and that its doing so was not error, but in accordance with the settled rule throughout the country.

Black on Judgments, Sec. 274.
Joyce vs. McAvoy, 31 Cal. 274 on 288.
Maples vs. Mackey, 89 Am. Dec. 448.
Callen vs. Ellison, 82 Am. Dec. 448.
Otis vs. Rio Grande, 1 Woods 279 (U. S.) Fed. case No. 10613.
Foltz vs. St. Louis & S. F. Ry. Co., 60 Fed. 316 on 318 and 319

Jurisdictional facts are conclusively presumed in courts of general jurisdiction even when not found by the court.

Coit vs. Haven, 79 Am. Dec. 244 on 247.

While as a general rule it may be conceded that the jurisdiction of the court rendering the judgment may be questioned in a collateral proceeding, it is nevertheless the fact that such interference can be only by a separate and distinct tribunal, one which is not bound by the adjudication, for to hold otherwise would be to lay down the doctrine that even after an appellate court has found as a matter of fact and law that the parties and subject matter were within and subject to the jurisdiction of the lower court, that tribunal could be asked to nullify such adjudication by the appellate court, and redetermine that question in an entirely collateral issue, without paying any attention to the decision in the action itself. The rule applies chiefly to judgments or sister states or foreign judgments.

On this point we would call the attention of the court to the case of Evers vs. Watson, 156 U. S. 527, in which on page 533 the court in the course of its opinion says:

> "But we do not wish to be understood as holding that, even if jurisdiction had not been apparent upon the record, advantage could be taken of it after a final decree in a collateral proceeding. Thus in Skillern's Ex. vs. May's Ex., 6 Cranch 267, a case which had been reversed by this court and sent back to the Circuit Court, it was discovered to be one not within the jurisdiction of the court; but as it appeared that the merits had been finally decided in this court and its mandate required only the execution of the decree, it was held that the Circuit Court was bound to carry the decree into execution, although the jurisdiction of that court was not alleged in the pleadings. So in McCormick vs. Sullivan, 10 Wheat 192, a

prior judgment between the privies in estate was pleaded in bar of the remedy sought to be enforced in the suit then under consideration, and objection was made that the proceedings did not show that the parties to it were citizens of different states, and consequently that the court was without jurisdiction and decree void. It was held, however, that the courts of the United States, though limited, were not of inferior jurisdiction, and that if jurisdiction was not alleged in the pleadings, their judgments and decrees were erroneous and might be reversed for that cause; but that they were not absolute nullities, and that the decree in the former case, while it remained unreversed, was a valid bar to the suit under consideration. To the same effect are Ex Parte Watkins, 3 Pet. 193; Kennedy vs. Georgia State Bank, 8 How. 586. Des Moines Navigation Co. vs. Iowa Homestead Co., 123 U. S. 552, and the recent case of Dowell vs. Appelgate, 152 U. S. 327."

THIRD.

THE JUDGMENT THROUGH WHICH APPELLEE DERAIGNS ITS TITLE IS VALID. THE COURT RENDERING THE SAME HAVING JURISDICTION OF THE PARTIES AND SUBJECT MATTER.

On this point this court is bound by its former adjudication of that fact (in the case of Linn vs. Gila B. R. & I. Co. No. 1996) and it can not now be asked to destroy the titles built upon that decision and its orders thereunder. It is well settled and properly so, that where a court has erroneously held that certain things were sufficient to give jurisdiction, and titles have been built thereon, the doctrine of *stare decisis* forbids the overruling of those decisions. (See Van Fleet on Collateral Attack, page 3). If this is true where the court has erroneously so decided, it certainly is more forcibly so where the same is properly decided.

The only basis for the contention of the appellant as to the non-jurisdiction of the court in the former case, above referred to, is that the receiver who was ordered by the court to sell the property was not by any formal order appointed as such receiver in the case.

This contention is so glaringly absurd a basis for raising the question of jurisdiction that we might confidently allow the matter to rest on its own demerits without further argument.

The court in its findings of fact in the case above cited, recognized the receiver, who was appointed as such in another action between the same parties and concerning the same property, as being the custodian of the property in the second action, and in its judgment considers his receivership extended to the second action and orders and directs him to sell the property, which order was followed and the property subsequently vested in the appellee. It is certainly not a question of jurisdiction, whether the receiver was appointed by a formal order or whether he, being already the receiver of the property, appointed by the court in a former suit between the same parties, was recognized by the court as the custodian of the property for all the parties concerned, and in its judgment and order subsequently made, recognized him as such. The question raised is merely one of procedure in the appointment of the receiver, and while it is usual to extend the receivership by a formal order to that effect the failure to do so certainly raises no question of the jurisdiction of the court, but merely one of procedure, and one which should have been raised in the case itself but can not be now raised in an entirely collateral issue.

In Cooper vs. Reynolds, 10 Wall. 308, this court said:

> "It is of no avail to show that there are errors in the record, unless they be such as to prove that the court has no jurisdiction in the case, or that the judg-

ment rendered was beyond its powers. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law."

In the case of Hunt vs. Hunt, 72 N. Y. 217 on 219, Mr. Justice Folger, writing the opinion, says:

"Jurisdiction of the subject matter is power to adjudge concerning the general question involved." * *
"It is the power to act upon the general, and so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."

In Hope vs. Blair, 105 Mo. 85 the court upon this point holds that jurisdiction over the subject matter is the right to grant the relief prayed for. The contention of the appellant as regards the appointment of the receiver which is the sole basis of its attack upon the judgment herein under discussion, surely does not raise any question as to the power of the court to pass upon the merits of the controversy nor of the jurisdiction of the parties to the action. That being so, the court having the power to adjudicate upon the facts presented before it (being the enforcement of certain liens) and all the parties having appeared and submitted to the jurisdiction of the court, it was then and there competent for the court to proceed with the trial of the controversy, and if in the course of the proceedings, some purely formal step was neglected, it was incumbent upon the complaining party to raise the question then and there, and he is estopped after final decree to, in an entirely collateal proceeding, raise the question.

Black on Judgments, Sec. 261.
White vs. Bogart, 73 N. Y. 256 on 259.
Moffit vs. Moffit, 69 Ill. 641.
Brooks vs. Mayor, 10 N. Y. Supp. 773.
Titus vs. Yaples, 80 Am. Dec. (Pa.) 604.

The contention of the appellant is that because the court in action No. 1996, above referred to, failed to appoint a separate receiver or enter an order extending the receivership of the receiver in a former suit between the same parties concerning the same property, that the said court lost jurisdiction over the property. This point was argued and passed upon by the Arizona Supreme Court, and decided in favor of the jurisdiction of the court, and this court afterwards affirmed that judgment so that question can not be now raised (raised by assignment of error No. 67 in case No. 1996, as follows):

Assignments LXVII and LXX of Assignments of Error in case of Linn and others vs. Gila Bend Reservoir and Irrigation Company, known as suit No. 1996:

> "The court erred in decreeing in such amended decree 'that on or before the day fixed for the sale hereunder, this defendant, the Arizona Construction Company, or the Peoria Canal Company, pay to the receiver heretofore appointed by this court such sum as may be necessary to pay the costs of this proceeding and of the execution of this decree by the receiver;' for the reason that no receiver had ever been appointed in this cause, nor had the powers and duties of the receiver appointed in suit No. 1728 (in which this defendant was therein plaintiff and said Arizona Construction Company and Peoria Canal Company were therein defendants, and then and now pending in said court) ever been enlarged sufficient to embrace and cover any such required payment to such receiver; and for the reason that the court was without rightful jurisdiction to order such payment to be so made, and for that the court erred in rendering such amended decree."

LXX.

> "The court erred in rendering any final decree herein or any amended decree, for the reason that it was without rightful jurisdiction to so render the same, or either of the same."

(See errors page 218, Record case 198, Oct. Term 1897 this court), even if it were a proper question to be determined in this action. It must be very apparent that the question is not one of jurisdiction. The property is within the territorial limits of the jurisdiction of the trial court, and it was not necessary for it to attach it or place it in the hands of a custodian in order to retain jurisdiction. The action was for the enforcement of certain liens against the property, and sale of the property. It is the practice for the court to obtain control of the property in order to render judgment which would bind it, only in cases where it is impossible by non-residence of the owner of the property to obtain personal service on the party so as to obtain a personal judgment against him, and for the purpose of rendering a binding judgment against the property, it is taken into control by the court. But where the parties are all served within the jurisdiction or they come in and submit to the jurisdiction of the court, a judgment against them upon the merits of the controversy binds the property, without the court being in the actual possession of it.

That a judgment agaist the parties to the action who are before the court and have submitted themselves to the jurisdicton of the court binds their property within the territorial limits of the court's jurisdiction, is too elementary to need the citation of authorities.

Now, what the court did in the action of Linn vs. the Gila Bend Reservoir and Irrigation Company, above referred to, was to adjudicate that the said defendant was indebted to the different plaintiffs in certain sums. That judgment immediately impressed its property with the lien of said judgments. The mere fact that the court went further and adjudicated the priority of the various judgments, and decreed that the property held by the trustee might be sold, unless the judgments were paid, would not make the action strictly speaking one *in rem,* for the reason that the judg-

ments were primarily against the parties themselves; the court sitting as a court of equity, had the power to adjudicate whether or not the property was subject to the various liens and the priority of such liens.

It must be borne in mind that the property was within the territorial limits of the court's jurisdiction, and as such could be acted upon by the court, as soon as it by proper process obtained jurisdiction of the parties claiming the title and others interested in the adjudication of the matters involved. The cases cited by the appellant in its brief in the court below are all cases wherein the defendant was a non-resident and there it was rightfully held to bring the proceedings before the court and as an act of assuming jurisdiction the court should take possession of the property in the way of seizing the same and placing it under its control; but in cases where the person of the defendants are within the jurisdiction of the court or submit to its jurisdiction, and the court as in this case, having the jurisdiction to pass upon the subject matter, and in addition thereto the property was within the territorial limits of its jurisdiction, we submit, there is no rule of law which would require of the court as a preliminary step to taking jurisdiction to seize the property and place it under its control.

On the question as to whether or not the court did actually take control of the property and appoint a receiver, we have the admission in the Abstract of Record that a receiver was appointed by the court to take control of the property in suit No. 1728 and we also have the judgment of the court in No. 1996 reciting the fact that the said property was in the hands of its receiver and that said receiver so in possession of the same under the order of the court, should sell the property as therein specified, which he did and the first lien paid from the proceeds of the sale was the receiver's certificates.

FOURTH.

THE APPELLANT NOT HAVING SHOWN ANY TITLE IN ITSELF, CAN NOT AS AGAINST THE APPELLEE IN POSSESSION, QUESTION THE TITLE OF THE APPELLEE.

It is well settled that in actions in the nature of the one at bar, the plaintiff can not depend upon the weakness of the title of the defendant, but must establish a superior title to that of the defendant. In other words, even if the title of the defendant is in some respects weak or faulty, the plaintiff is not in a position to complain, unless the title which he claims is superior, especially so as against one already in possession.

The plaintiff must show such a title in it as would enable it to maintain ejectment against the Gila Water Company.

Ely vs. R. R. Co., 129 U. S. 292 and 293.

Where the court in passing on our statutes on this subject, said:

> "It extends to cases in which the plaintiff is out of possession, and the defendant in possession and which at common law the plaintiff might have maintained ejectment."
>
> Holland vs. Challen, 110 U. S. 15 on 25.
> Frost vs. Spitley 121 U. S. 552 on 556.
> Dick vs. Foraker, 155 U. S. 404 on 414.

The defendant, the Gila Water Company, being in actual possession of the property in question that alone is sufficient proof of title in it to authorize the relief prayed for in its cross-complaint, there being no proof of title in the plaintiff.

Gage vs. Schmidt, 104 Ill. 106.
Brener vs. Biglow, 8 Kansas 496 * page.
Detlor vs. Holland, 40 L. R. A. 260 on 268.

The testimony introduced on the trial, and which stands uncontradicted is to the effect that the Gila Water Company, has been for a long time and now is in possession of all the property set forth in the complaint.

In addition to that, the Abstract of Record also shows that the appellant, the Gila Bend Reservoir and Irrigation Company conveyed what rights it had in the property to the Peoria Canal Company, and there is not one single iota of evidence that the Peoria Canal Company ever deeded the property back to the appellant, and as a matter of fact the appellee's title to a portion of the property is deraigned through the Peoria Canal Company, to whom the property was conveyed as above mentioned. (Transcript of Record, folio 20).

We therefore find the record showing very conclusively a conveyance of the property, divesting the appellant of any right it had in the property, and in the attempt to recover which it was defeated. That being so, and the appellee being in possession claiming ownership and establishing such ownership through mesne conveyances through the very party to whom the property was conveyed, the appellant stands as a stranger to the title and can not question the decree of the court below establishing the title of the appellee, it being, by reason of its conveyance of its own rights in the property, in the same position as any stranger to the title would be.

All of the other questions raised by the appellant in its brief in the court below relating to the court's losing jurisdiction upon the filing of the motion for change of venue, and the question of the entry of the judgment after the appeal, were before this court in case No. 1996, as will more

fully appear from the record in that case, and this court upon said appeal affirmed the judgment of the court below, directly passing on all the questions which are attempted to be argued by the appellant in this case.

We therefore submit that the Supreme Court of Arizona did not err in affirming the judgment of the trial court and its judgment should be by this court affirmed.

Respectfully submitted,

C. F. AINSWORTH,
Attorney for Appellee.

Supreme Court of the United States.

No. 226.—October Term, 1905.

Gila Bend Reservoir and Irrigation Company, Appellant, vs. The Gila Water Company.	Appeal from the Supreme Court of the Territory of Arizona.

[May 14, 1906.]

Mr. Justice McKenna delivered the opinion of the Court.

The appellant and appellee are Arizona corporations. The former brought this suit in the District Court of Maricopa County to quiet title to certain land and water rights against the appellee and the Peoria Canal Company, Valley Canal and Land Company, also Arizona corporations, and against the Arizona Construction Company, an Illinois corporation, and against certain persons, one of whom was a resident of the Territory, and the others non-residents. The complaint contained the usual allegations. All the defendants but the Gila Water Company, appellee herein, disclaimed title. The appellee answered denying appellant's title and, in a cross complaint, set up title in itself. To the cross complaint appellant answered that appellee claimed title "under and by virtue of a certain judgment and decree of this court (District Court of Maricopa County) rendered and entered November 20, 1894, and certain pretended receiver's deed or deeds made, executed and delivered under and by authority of said judgment and decree and proceedings thereunder, or a certain deed or deeds of some person or persons deriving title under, through and by virtue of said receiver's deed or deeds." And it was alleged that said judgment and the proceedings thereunder were void in that (1) the action in which the judgment was rendered was a proceeding *in rem* and that the court never acquired jurisdiction over the property or any part thereof; (2) that the judgment was rendered July 21, 1894, and appellant duly appealed from said judgment to the Supreme Court of the Territory, and the District Court thereby lost jurisdiction of the action, and yet on the 12th of November, 1894, the District Court entered a pretended amendment to the judgment and decree, which was pretended to be in lieu of the original decree of July 21, and that the only right and title appellee has to the property is under this "pretended, amended and void judgment and decree."

It was further alleged that the receiver was duly appointed in another action and that he took possession of the property, and that during the

time appellee claims to have obtained title to any of said property the same and the whole thereof was in the custody of the court and in the possession of the receiver, and that prior to the commencement of the suit at bar the court and receiver ceased to have any custody or possession of the property.

The trial court found that the appellee was the owner in fee simple of the property and adjudged that the claim of the appellant and all of the defendants in the question to be "invalid and groundless." The decree was affirmed by the Supreme Court.

The findings of fact of the Supreme Court are very general. They are only that the appellant had not, at the commencement of the action, any cause of action in respect to the property, and has not now any right, title or interest therein; that the appellee was the owner in fee simple and in possession thereof.

The special rulings of the trial court, which were assigned as errors and affirmed by the Supreme Court, appear in the opinion of the latter court and in the bill of exceptions. These rulings were made upon the introduction in evidence by the appellee to sustain its title of certain judgments rendered by the District Court of Maricopa County. The facts as to these judgments are stated by the Supreme Court as follows:

"It appears that in the District Court of Maricopa County, in the year 1893, the appellant brought suit against the Peoria Canal Company and the Arizona Construction Company and applied for a receiver therein to take possession of the property in controversy in this action. Thereafter the court appointed one James McMillan as such receiver who took possession of the property, and by leave of the court issued a large amount of receiver's certificates to meet the expenses of necessary improvements upon the property. This suit was docketed as number 1728. Pending this action, one W. H. Linn, and others, brought suit in the District Court of Maricopa County, against the appellant and other defendants, alleging in their complaint, among other facts, the pendency of action number 1728, the appointment of the receiver and the issuing of the receiver's certificates, and praying, among other things, that the assets of the Gila Bend Reservoir and Irrigation Company be marshalled and that the receiver take possession of and be directed to sell the property of the said company and from the proceeds of said sale pay the debts adjudged due against it.

"All the parties to this suit, including the Gila Bend Reservoir and Irrigation Company, appeared and answered. A trial was had and judgment was rendered, in which the receiver was directed to sell the property. The record further discloses that a sale was made under this judgment by the receiver, which was affirmed by the court, and a deed executed by the said receiver, which was affirmed by the court, and a deed executed by the said receiver to the purchaser, who was one of the grantors of the appellee. This judgment was appealed from to this court, where it was affirmed, and subsequently an appeal was taken by the appellant to the Supreme Court of the United States, where the judgment of this court was affirmed. The latter suit in the court below was docketed as number 1996. The objection which the appellant urged in the court below to the judgment in cause

numbered 1996 was that it appears upon the face of the record that the judgment, ordering sale of the premises by the receiver was without jurisdiction and void for the reason that no order was made by the court extending the receivership in suit number 1728 to cause number 1996. In passing upon this objection the trial court pointed out that all the parties in the cause number 1728 were parties in cause number 1996, that, when the latter suit was brought, the property was in the hands of the court, through its receiver, and that after the bringing of cause number 1996 the record disclosed that the court and all the parties, including the Gila Bend Reservoir and Irrigation Company, treated the property in possession of the receiver, appointed in cause number 1728, as though it had been placed in his possession as a receiver appointed in cause number 1996, and, further that orders were made by the court concerning said receivership which were entitled in both suits jointly, and held that, although no order was made consolidating the two suits and no order was in terms made extending the receivership to the second suit number 1996, the receivership was in fact extended to the second suit, and that the court, by its action, ratified the acts of the receiver in the second suit and thereby, in effect, extended his power and authority as such receiver to said second suit.

"The view thus taken is amply justified by an inspection of the record in the two suits, and upon this ground alone the action of the trial court in admitting the judgment was correct."

We concur in this conclusion. The objection made by the appellant to it is, as we have indicated, that suit No. 1996 was a proceeding *in rem* and that the court did not acquire jurisdiction of the property for the reason that it was in the custody of the court in suit No. 1728, and that the court in the latter case did not extend the receivership to the No. 1996 nor consolidate the suits, and, therefore, had no power to order the sale of the property by the receiver in No. 1728.

This is tantamount to saying that the absence of formal orders by the court must prevail over its essential action. It is clear from the record that the District Court considered the cases pending before it at the same time, considered No. 1996 as the complement of No. 1728, regarded the cases in fact as consolidated, and empowered the receiver appointed in 1728 to sell the property and distribute the proceeds as directed by the decree in 1996. The provision of the decree entered July 21, 1894, (and of the amended decree of November 20, 1894,) is as follows:

"It is further ordered, adjudged and decreed by the court that James McMillan, the receiver heretofore appointed by this court, and now in possession of said premises under the orders of this court, proceed to advertise and sell said property and distribute the proceeds as directed in the decree."

This decree was affirmed by the Supreme Court of the Territory and afterwards by this court. The assignments of error, therefore, are without foundation.

Decree affirmed.